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Supreme Court, U.S.
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No. 04-__

IN THE

Supreme Court of the United States

Russell J. Hadfield,

Petitioner,

v.

Joseph McDonough, in his individual and official capacity as Sheriff of Plymouth County, Massachusetts, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), this Court held that tenured state employees have a right under the Due Process Clause to notice and a hearing before they are terminated. The courts of appeals are divided over the following question:

Does the failure to provide the pre-termination hearing required under *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), no longer violate the Due Process Clause if denial of the hearing also contravenes state law and state law provides a post-termination remedy?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, defendants in the proceeding below include Matthew Hanley, in his individual and official capacity as Special Sheriff of Plymouth County; John P. Riordan, Robert J. Stone, and Peter G. Asiaf, Jr., in their official capacities as County Commissioners of Plymouth County; and John F. McLellan, in his official capacity as Treasurer of Plymouth County. Defendants Charles Lincoln and Coleman McDonough were voluntarily dismissed in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Russell J. Hadfield respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-16a) is published at 407 F.3d 11. The district court's order granting summary judgment in favor of respondents (Pet. App. 17a - 19a), dated October 22, 2003, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. Petitioner worked for the Plymouth County Massachusetts Sheriff's Department in various capacities from 1983 until early 2001, ultimately reaching the position of Assistant Deputy Superintendent in Field Services for Training ("ADS for Training"). Pet. App. 3a. In 2000, respondent Joseph McDonough defeated the incumbent in an election for Sheriff. Respondent terminated petitioner shortly after taking office. *Id.* 3a-4a.

Prior to his termination, petitioner had supported respondent McDonough's opponent in the Sheriff's election. Among other things, petitioner held campaign signs for the incumbent at various rallies. On November 4, 2000, on his way to one such event, petitioner passed another rally at

which many people were holding signs supporting McDonough. Petitioner attended this rally while holding a sign supporting McDonough's opponent. McDonough's brother and another supporter approached petitioner, telling him he should not be attending the rally, that his attendance was a "bad career move," and that he "[n]ow [was] at the top of the list." Pet. App. 3a.

After winning the election, McDonough summarily fired petitioner without explanation. Pet. App. 4a. Petitioner was given no prior notice of the impending action and was not given a pre-termination hearing. *Ibid.* Petitioner then asked for a hearing before the Plymouth County Board of Commissioners (which serves as the county personnel board) in order to show that he remained qualified for his position and was fired for his political affiliation with the prior Sheriff, an impermissible ground under state law.[1] The Board denied the request for a hearing. *Ibid.*

2. In April 2001, petitioner timely filed this 42 U.S.C. 1983 action in the United States District Court for the District of Massachusetts. Petitioner alleged that he was fired in violation of the First Amendment because of his support for the Sheriff's political rival. Petitioner also alleged that his summary dismissal violated the Due Process Clause because under *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), tenured state employees have a due process right to a pre-termination hearing. Pet. App. 4a.

Respondents moved for summary judgment. With respect to petitioner's due process claim, respondents acknowledged that under *Loudermill* a tenured public employee is entitled to a pre-termination hearing. See C.A. Joint App. 170.[2] They nonetheless asserted that the Sheriff's

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[1] See *Sheriff of Plymouth County* v. *Plymouth County Pers. Bd.*, 440 Mass. 708, 714 (2004).

[2] Respondents argued that petitioner was not a tenured public employee as a matter of state law, but the district court assumed

failure to provide one did not violate the Due Process Clause. In support, respondents relied on this Court's pre-*Loudermill* decisions in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984). See C.A. J.A. 170-77. Those rulings did not involve employment relationships. Rather, in those cases this Court held that the Due Process Clause was not violated when prison guards negligently (*Parratt*) or maliciously (*Hudson*) lost or destroyed a prisoner's property without first affording the inmate a hearing. See *Parratt*, 451 U.S. at 537; *Hudson*, 468 U.S. at 520. In both cases, this Court held that because the guards' conduct was "random and unauthorized" it would not have been feasible to provide a pre-deprivation hearing and, therefore, an adequate post-deprivation remedy was all the Due Process Clause required. See *Parratt*, 451 U.S. at 541-44; *Hudson*, 468 U.S. at 533-36.

In this case, respondents argued that the "*Parratt-Hudson*" doctrine establishes that the Due Process Clause is not violated by the "random and unauthorized" acts of public officials so long as an adequate post-deprivation remedy is available. Respondents noted that in accordance with *Loudermill*, a state statute required pre-termination hearings for tenured county employees. Thus, respondents reasoned, the Sheriff's failure to provide petitioner with a pre-termination hearing was necessarily "random and unauthorized" within the meaning of *Parratt-Hudson*. On that view, the failure to provide the pre-termination hearing required by *Loudermill* was not a violation of petitioner's federal due process rights because state law provided a post-termination remedy in the form of a right to challenge the termination in state court.

The district court agreed. Relying on the First Circuit's decision in *Lowe* v. *Scott*, 959 F.2d 323, 340 (1992), the court

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that he was for purposes of ruling on the motion for summary judgment. Pet. App. 18a.

held that petitioner's due process claims were barred by the *Parratt-Hudson* doctrine. Pet. App. 18a.[3]

4. The court of appeals affirmed. The court "assume[d] *arguendo* that Hadfield possessed a property interest in continued employment and the concomitant right to a hearing concerning his termination." Pet. App.13a. It nevertheless determined "that Hadfield's claim is barred by the *Parratt-Hudson* doctrine." *Id.* 12a. Under settled First Circuit precedent, "when a deprivation of a property interest is occasioned by random and unauthorized conduct by state officials * * * the due process inquiry is limited to the issue of the adequacy of the postdeprivation remedies provided by the state." *Id.* 13a (citations omitted). The court defined "random and unauthorized conduct," for *Parratt-Hudson* purposes, as including the class of cases in which a government official "misapplies state law to deny an individual the process due under a correct application of state law." *Ibid.* "In other words, conduct is 'random and unauthorized' within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself." *Id.* 13a-14a.

In this case, a state statute guaranteed tenured county employees the right to a pre-termination hearing. See Pet. App. 14a; Mass. Gen. Laws ch. 35, § 51. Thus, the court held, even if petitioner was entitled to a pre-termination hearing as a matter of federal constitutional law, respondent's violation of that right was "the sort of random and

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[3] The district court also entered summary judgment in respondents' favor on petitioner's First Amendment claims, accepting respondents' argument that political loyalty was a legitimate job requirement for petitioner's position as ADS for Training. Pet. App. 17a. The court of appeals subsequently affirmed that determination. *Id.* 5a-11a. Petitioner does not seek review of the holding that the First Amendment does not itself forbid petitioner's termination on the basis of his political affiliation.

unauthorized conduct to which *Parratt-Hudson* applies," because the denial was also a violation of the state civil service statute for county employees. *Id.* 15a. The court further concluded that state law provided petitioner an adequate post-termination remedy because he could appeal his dismissal to a state district court and obtain reinstatement. *Ibid.* Accordingly, because state law provided an adequate post-termination remedy, the failure to provide the pre-termination hearing otherwise required by *Loudermill* did not violate petitioner's due process rights. *Id.* 15a-16a.

In reaching this conclusion, the court of appeals acknowledged that "other courts * * * have taken a narrower view of 'random and unauthorized conduct,'" citing as an example the Ninth Circuit's decision in *Honey* v. *Distelrath*, 195 F.3d 531, 533-34 (1999). See Pet. App. 14a n.6. But the panel concluded that it was bound to follow the First Circuit's "broader view." *Ibid.*

5. This petition followed.

REASONS FOR GRANTING THE WRIT

The First Circuit in this case applied its settled precedent construing the *Parratt-Hudson* doctrine to excuse denials of the pre-termination hearings required by *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), if the denial also violates state law and state law provides a post-termination remedy. That conclusion is shared by the Seventh Circuit, but rejected by four other courts of appeals. The First Circuit's holding is moreover wrong, conflicting not only with the holding in *Loudermill* but also with this Court's explicit rejection of an indistinguishable attempt to invoke the *Parratt-Hudson* doctrine in *Zinermon* v. *Burch*, 494 U.S. 113 (1990). Certiorari is warranted to resolve this entrenched circuit split and to reimpose the authority of this Court's precedents in this important area of the law.

I. The Courts Of Appeals Are Divided Over The *Parratt-Hudson* Doctrine's Application To Denials Of Pre-Deprivation Hearings For Tenured Public Employees.

The courts of appeals have acknowledged that there is a fundamental disagreement among the circuits over the breadth of the *Parratt-Hudson* doctrine in general, and its application to denial of pre-deprivation hearings in the employment context in particular.

A. Background

This Court has held that, as a general matter, the Due Process Clause requires state officials to provide notice and an opportunity to be heard prior to depriving individuals of life, liberty or property. See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The rule is not without exceptions, however, and whether a pre-deprivation hearing is required must be determined in different contexts through a balancing of competing individual and state interests. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). The dispute in this case is over the relationship between four cases in which this Court has applied that balancing test to determine whether a person was denied due process by state officials' failure to provide a pre-deprivation hearing.

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), this Court considered whether an inmate had a right to a pre-deprivation hearing before prison officials negligently lost his mail-order hobby kit. Because the loss of the prisoner's property was "a result of a random and unauthorized act by a state employee" and "not a result of some established state procedure," this Court concluded that it was "difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.* at 541. As a result, the Court held that an adequate post-deprivation tort remedy was all the Due Process Clause required. *Ibid.*

In *Hudson* v. *Palmer*, 468 U.S. 517 (1984), this Court extended *Parratt* to a case in which a prison guard intentionally (rather than negligently) deprived a prisoner of his personal property and legal papers without a pre-deprivation hearing. See *id.* at 533. Together, these cases established what is often called the "*Parratt-Hudson*" doctrine.

The Term after *Hudson* was decided, this Court considered whether a State's post-deprivation remedies were sufficient to satisfy the due process rights of workers terminated from public employment. In *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), a tenured security guard at a public school alleged that his right to due process was violated because he was terminated without an adequate pre-termination hearing. The district court dismissed the claim, holding that the State's provision of a post-termination hearing was all the process to which he was entitled. *Id.* at 536. This Court disagreed. The Court first held that the plaintiff had a constitutionally protected property interest in continued employment because state law established that tenured public employees could be dismissed only for good cause. *Id.* at 538-39. The "need for some form of pretermination hearing" to protect that interest, this Court held, "is evident from a balancing of the competing interests at stake." *Id.* at 542. Applying the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court concluded that the employee had a substantial interest in retaining his employment, that providing a pre-termination hearing "is recurringly of obvious value in reaching an accurate decision," and that the "governmental interest in immediate termination does not outweigh these interests." 470 U.S. at 543-44. In contrast to the unusual circumstances in *Parratt* and *Hudson* in which a pre-deprivation hearing was not feasible, the Court held that, in the employment context, it was entirely feasible to provide a pre-termination hearing because "affording the employee an opportunity to respond prior to termination would impose neither a significant

administrative burden nor intolerable delays." *Id.* at 544. Accordingly, the Court concluded that "some form of pretermination hearing" was required before a tenured state employee may be terminated. *Id.* at 542.

Five years later, in *Zinermon* v. *Burch*, 494 U.S. 113, 116 (1990), this Court granted certiorari to resolve a circuit conflict "over the proper scope of the *Parratt* rule." The plaintiff in *Zinermon* alleged that his due process rights were violated when he was confined to a state mental institution for five months as a "voluntary" patient, even though he was manifestly incompetent to provide informed consent at the time of his admission. Because he was not competent to consent to institutionalization, both state law and the Due Process Clause required hospital officials to hold a hearing to determine whether Burch was a danger to himself or others before admitting him to the hospital. See *id.* at 123, 131, 134. The defendants nonetheless argued that under the *Parratt-Hudson* doctrine, denying Burch a preadmission hearing did not deny him due process because that failure was "a random, unauthorized violation of the Florida statutes governing admission of mental patients." 494 U.S. at 115. This Court rejected that view of *Parratt* and *Hudson*. "[T]hose cases," this Court explained, "do not stand for the proposition that in every case where a deprivation is caused by an 'unauthorized . . . departure from established practices,' state officials can escape § 1983 liability simply because the State provides tort remedies." *Id.* at 138 n.20 (citation omitted). Instead, the Court held that the "proper inquiry under *Parratt* is 'whether the state is in a position to provide for predeprivation process.'" *Id.* at 130 (quoting *Hudson*, 468 U.S. at 534) (emphasis omitted). In the case before it, this Court noted, the deprivation of Burch's liberty was predictable and holding a preadmission hearing was clearly feasible. *Id.* at 136-37. Moreover, the "deprivation here is 'unauthorized only in the sense that it was not an act sanctioned by state law, but, instead, was a 'deprivation of constitutional rights * * * by an official's abuse of his

position.'" *Ibid.* (citation omitted). *Id.* at 138. Accordingly, this Court explained, "[w]e conclude that petitioners cannot escape § 1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy." *Ibid.*

B. The Present Circuit Split

The courts of appeals are avowedly divided over whether *Parratt* and *Hudson* create an exception to the rule of *Loudermill*.

1. The First and Seventh Circuits have held that, under *Parratt-Hudson*, no due process violation occurs when a government official denies a pre-deprivation hearing to a tenured employee, so long as the denial is also in violation of state law and the state provides a post-deprivation remedy that offers the employee a meaningful opportunity to challenge the termination. The First Circuit applied that rule in this case, as it has in a number of prior employment cases. See Pet. App. 13a-14a; *O'Neill* v. *Baker*, 210 F.3d 41, 50 (2000); *Cronin* v. *Town of Amesbury*, 81 F.3d 257, 260 (1996).

The Seventh Circuit reached the same conclusion in *Lolling* v. *Patterson*, 966 F.2d 230 (1992). In that case, a deputy alleged that the Sheriff violated his due process rights by summarily suspending him without pay. *Id.* at 232. The Seventh Circuit held that under *Parratt-Hudson*, the plaintiff's "due process rights were not violated" because the denial of a pre-suspension hearing contravened state law and, therefore, was "random and unauthorized." *Id.* at 233-34.[4]

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[4] The court of appeals assumed that the employee was entitled to a pre-suspension hearing under the Due Process Clause. This Court subsequently held that a sufficiently prompt post-suspension hearing is constitutionally adequate when there is substantial assurance that the suspension was not baseless or unwarranted. See

See also, *e.g.*, *Robinson* v. *Winslow*, 88 Fed. Appx. 93, 95 (CA7 2004) (failure to provide notice required by Due Process Clause prior to forfeiture of assets was "random and unauthorized" because it violated state law and, therefore, due process satisfied by post-seizure remedy) (unpublished); *Strasburger* v. *Board of Educ.*, 143 F.3d 351, 358 (CA7 1998) (dismissing due process claim of tenured teacher who alleged he was dismissed without a pre-termination hearing, on the ground that he "has not alleged or shown that Illinois postdeprivation remedies are lacking").

2. Four other circuits have squarely rejected this view. In *Fields* v. *Durham*, 909 F.2d 94, 96-97 (1990), for example, the Fourth Circuit rejected the argument that the *Parratt-Hudson* doctrine precluded the due process claim of a tenured professor who alleged that he was terminated from his position as a dean and faculty member without an adequate pre-termination hearing. In a prior opinion, the court of appeals had concluded that the professor's "complaint alleged at most a random and unauthorized failure of college officials to follow state procedures in connection with his termination" and therefore under *Parratt-Hudson*, "due process was satisfied by the meaningful postdeprivation remedies available under Maryland law." *Id.* at 96. However, when this Court vacated and remanded the case for reconsideration in light of *Zinermon* v. *Birch*, 494 U.S. 113 (1990), the Fourth Circuit rejected its prior reliance on the *Parratt-Hudson* doctrine. The relevant question in deciding whether a pre-termination hearing was constitutionally required was not

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Gilbert v. *Homar*, 520 U.S. 924, 931 (1997). However, the Seventh Circuit's construction of the *Parratt-Hudson* doctrine did not turn on the particular type of employment action at issue and would apply equally in a termination case. See, *e.g.*, *Sweeney* v. *Bausman*, No. 88-C-20370, 1992 U.S. Dist. LEXIS 19677 (D. Ill. 1992) (under *Lolling*, suit challenging dismissal of deputies without state-required pre-termination hearing was barred by *Parratt-Hudson*).

whether the state's denial of such a hearing was "unauthorized," the court held; rather it was whether, absent such a hearing, the risk that the state would erroneously deprive the employee of his job was "foreseeable." *Id.* at 97. And because the risk of "erroneous deprivation of a public education official's property interest in employment" was foreseeable, the Fourth Circuit found *Parratt-Hudson* inapplicable. *Ibid.*

The Fifth Circuit reached the same conclusion in *Findeisen* v. *North East Independent School District*, 749 F.2d 234, 238-39 (1984), in which a tenured school teacher was constructively discharged without a pre-termination hearing. The court concluded that *Parratt* simply indicated that "the imperative of a predeprivation hearing wanes when impractical, as in a negligent tort situation," but that "absent the necessity of quick action by the State or the impracticality of providing any predeprivation process, a postdeprivation hearing [is] constitutionally inadequate." *Id.* at 238 (citation omitted). The court held that because "a school board can easily hold a meaningful predeprivation hearing to properly consider whether to discharge a tenured teacher," the rule of *Parratt* did not apply. *Id.* at 239.

In *Dwyer* v. *Regan*, 777 F.2d 825 (1985), the Second Circuit likewise upheld a due process challenge by a government accountant who was terminated by the head of his department without a hearing. The district court had dismissed the complaint on the ground that the failure to provide a hearing was "unauthorized by the State and, since the State could not have anticipated such unauthorized acts, the failure to provide [the plaintiff] with a pretermination hearing did not, according to *Parratt* and *Hudson*, violate due process." *Id.* at 832. The Second Circuit "reject[ed] this view," concluding that the doctrine does not apply when "the depriving actions were taken by a high-ranking official having final authority over the decision-making process, * * * they [are] not random or unauthorized within the meaning of *Parratt*," even if in contravention of state or local law. *Ibid.*

As the First Circuit acknowledged in this case, its interpretation of the scope of the *Parratt-Hudson* doctrine also conflicts with the Ninth Circuit's decision in *Honey* v. *Distelrath*, 195 F.3d 531 (1999). See Pet. App. 14a n.6. In *Honey*, a tenured prison guard was terminated because of allegations of misconduct. The parties did not dispute that the only pre-termination process provided to the guard was constitutionally inadequate because he was not given access to any of the documentary evidence upon which the allegations of misconduct were based. *Id.* at 532. The employer nonetheless argued that the lack of an adequate pre-termination hearing was excused by *Parratt-Hudson* because the "deprivation resulted from actions that were in violation of established law" and thus, "the conduct was random and unauthorized." *Id.* at 533-34. The Ninth Circuit rejected this argument, holding that "even acts in violation of established law may be considered 'authorized.'" *Id.* at 534. Accordingly, the court held that "the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation complained of, and the duty to afford [the plaintiff] procedural due process." *Ibid.* Although the decision in *Honey* did not involve the complete denial of a pre-termination hearing, the Ninth Circuit's reasoning makes clear that it would not find petitioner's claims barred by *Parratt-Hudson*.

3. This division and confusion is untenable. Consistent with *Loudermill*, civil service schemes throughout the country have incorporated the right to a pre-termination hearing for tenured employees in order to comply with the requirements of the Due Process Clause.[5] The decisions of the First and

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[5] For just a few of the examples of these schemes prevalent through the nation, see, *e.g.*, Ala. Code 36-26-103; Ky. Rev. Stat. 18A.095, 151B.055, 281.771-.772; Mass. Gen. Laws ch. 35, § 51; Mich. Stat. Ann. 122A.40; Nev. Rev. Stat. 284.390; N.Y. Civ. Serv. 75; Ohio Rev. Code 124.34; 74 Okla. St. Ann. 840-6.4; W.

Seventh Circuits, however, now raise the question whether the right recognized in *Loudermill* will continue to have any practical significance. For in those circuits, incorporation of the *Loudermill* requirement into state law ironically relieves state officials of the constitutional obligation to actually provide such hearings in practice.

Thus, as the conflicting state of the law now stands, a tenured government employee summarily discharged in Boston or Chicago effectively has no federal redress when the hearing is not provided, while the courts in New York and Los Angeles will ensure that the hearing required by *Loudermill* is not only promised by state law, but actually delivered in practice. The abundance of cases addressing the question shows that the question is not only important, but recurring. And while more than two decades have passed since this Court decided *Loudermill*, the courts of appeal show no signs of resolving this division on their own. This Court should not permit this disparity in treatment, potentially affecting hundreds of thousands of public employees throughout the nation, to persist any longer.

4. Review in this case is moreover appropriate because it would help bring certainty to what one judge has described as a "doctrinal swamp" in need of "clarification by the Supreme Court." *O'Neill* v. *Baker*, 210 F.3d 41, 51 (CA1 2000) (Selya, J., concurring in judgment). See also *Caine* v. *Hardy*, 943 F.2d 1406, 1415 (CA5 1991) ("[T]he courts of appeals have not found *Zinermon* easy to interpret."); *Easter House* v. *Felder*, 910 F.2d 1387, 1409 (CA7 1990) (Easterbrook, J., concurring) (describing *Parratt*, *Hudson*, and *Zinermon* as forming a line of precedent "resembling the path of a drunken sailor," "leav[ing] judges of the inferior federal courts in a

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Va. Code 18A-2-8; Miss. Code Ann. 21-31-23, 21-31-71; see also, *e.g.*, *Odum* v. *University of Alaska, Anchorage*, 845 P.2d 432, 434 (Alaska 1993) (state constitution requires pre-termination hearing); Clark County Code 2.40.040 (county code requires pre-termination hearings).

difficult position, because any effort to reconcile and apply the cases will be met with a convincing demonstration * * * that there is a fly in the ointment").

The Sixth Circuit, for example, has acknowledged that its cases reflect a profound confusion about the proper application of the doctrine in the employment context, leading to inconsistent results for similarly situated employees. See *Mitchell* v. *Fankhauser*, 375 F.3d 477, 482 (CA6 2004) (collecting cases).

Courts have also reached divergent conclusions about the doctrine's application in other contexts. For example, in *Easter House* v. *Felder*, 910 F.2d 1387 (1990), the Seventh Circuit held that *Parratt-Hudson* barred a claim that state officials violated the Due Process Clause by denying renewal of an adoption agency's license without a prior hearing because the denial of the hearing was also in violation of state law. The *Parratt-Hudson* doctrine, the court held, precludes a due process suit to "remedy deprivations which occur at the hands of a state employee who is acting in direct contravention of the state's established policies and procedures which have been designed to guarantee the very protections which the *employee* has now chosen to ignore." *Id.* at 1404.[6] In *Plumer* v. *State of Maryland*, 915 F.2d 927 (CA4 1990), however, the Fourth Circuit reached the opposite conclusion with respect to an indistinguishable licensing case. In *Plumer*, state employees revoked a woman's driver's license without affording her a pre-revocation hearing, in violation of state procedures. Reviewing the same cases from this Court, the Fourth Circuit concluded that *Parratt-Hudson*

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[6] See also *Birkenholz* v. *Sluyter*, 857 F.2d 1214, 1217 (CA8 1998) (doctrine applied to bar due process claim by nurse found guilty of patient neglect at nursing home by state licensing officials without a hearing because the nurse "complains solely of the 'arbitrary and capricious' behavior of defendants, and does not challenge the underlying procedures that authorized defendants' actions").

was inapplicable. In direct conflict with the view of the Seventh Circuit, the court held that "[w]hen a state government can and does provide a predeprivation hearing and charges its employees with effecting the deprivation complained of, the availability of an adequate state postdeprivation remedy does not, standing alone, satisfy the Due Process Clause." *Id.* at 931.

5. This case presents an ideal vehicle for resolving the circuit split. The First Circuit's construction of the *Parratt-Hudson* doctrine was determinative of petitioner's due process claims. See Pet. App. 11a-16a. Moreover, the conflict is squarely presented by the facts of this case – the precise opposite result would have been reached in the Second, Fourth, Fifth, or Ninth Circuits, each of which has upheld indistinguishable claims against a *Parratt-Hudson* defense. Indeed, the relevant facts in petitioner's case are remarkably similar to those in the cases forming the circuit split, many of which involved denials of pre-deprivation hearings to tenured law enforcement officers by officials who were authorized by state law to effect the deprivation but required by both state law and *Loudermill* to provide a hearing first. Compare Pet. App. 3a-4a (termination of sheriff's deputy without hearing) with *Lolling*, 966 F.2d at 232 (no hearing prior to suspension of sheriff's deputy without pay) and *Honey*, 195 F.3d at 532 (termination of prison guard without prior hearing).

II. The First Circuit's Interpretation Of The *Parratt-Hudson* Doctrine Conflicts With The Decisions Of This Court.

The decision of the court of appeals also warrants review because it is contrary to this Court's precedents. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), answered the basic constitutional question posed in this case, holding that a tenured public employee like petitioner has a federal constitutional right to a hearing *before* he is terminated, regardless of the availability of post-termination

remedies. The court of appeals' conclusion to the contrary is based on a misconception of the *Parratt-Hudson* doctrine, a misconception that notably has already been corrected once by this Court in *Zinermon* v. *Burch*, 494 U.S. 113 (1990). Correction is required again, however, as both the First and Seventh Circuits continue to fundamentally misapply the *Parratt-Hudson* doctrine to deprive public employees within their jurisdiction of clearly established due process rights.

A. *The Court Of Appeals Misapplied* Parratt-Hudson *In Conflict With This Court's Decision In* Loudermill.

The decision of the court of appeals is incompatible first and foremost with *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), which established petitioner's unqualified right to a pre-termination hearing. The *Parratt-Hudson* doctrine, which applies when a pre-deprivation hearing is infeasible, simply has no application in the context of employment termination, in which a pre-deprivation hearing is *always* feasible.

1. In *Loudermill*, this Court fully considered the conditions under which a pre-termination hearing is required and reached an unambiguous conclusion: "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546. The Court specifically rejected the claim that post-termination procedures were sufficient to satisfy due process. See *id.* at 537-38. The Court observed that "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision." *Id.* at 543. Even when there are no factual disputes and the authority to terminate an employee is undisputed, "a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one." *Id.* at 543 n.8. Indeed, because it is so difficult to convince officials that they have made a mistake after the decision has been made, "the only meaningful opportunity to invoke the discretion of the

decisionmaker is likely to be before the termination takes effect." *Id.* at 543.

Yet, in this case, the court of appeals held precisely the opposite, concluding that all the process petitioner was actually due was an adequate post-termination remedy. Pet. App. 15a. The only reason the court gave for this diametrically opposed result was that the Sheriff decided to flout this Court's instructions in *Loudermill* and, in so doing, violated state law as well. But nothing in *Loudermill* suggests that the Court intended perversely to excuse a violation of the Due Process Clause so long as the defendant was simultaneously violating state law.

Indeed, the Court's opinion in *Loudermill* strongly suggests otherwise. The employer in that case argued that because the Due Process Clause protects only property interests created by state law, state law may also define the process that must be provided before that property may be taken. 470 U.S. at 539-40. Because state law provided only for a post-termination hearing, the employer argued, that was all the procedural protection required under the Due Process Clause. This Court rejected this assertion that a pre-termination hearing is constitutionally optional simply because state law does not require one. *Id.* at 541. While state law may define what constitutes a property interest under the Due Process Clause, this Court explained, federal constitutional law defines the process a state must afford before depriving individuals of that property interest. *Id.* at 539-41. Yet, under the First Circuit's rule, state law may effectively render a pre-termination hearing constitutionally optional by (ironically) requiring one. In such states, if public officials do not provide a pre-termination hearing, due process is satisfied by providing the post-termination hearing this Court held inadequate in *Loudermill*.[7]

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[7] Consequently, while one might suppose that constitutional doctrines would encourage compliance with state law, the respondents in this case escaped liability in the lower courts

2. Certainly nothing in *Parratt* or *Hudson* justifies this result. Those cases did not create a sweeping exception to the due process requirements established in this Court's cases. Instead, the doctrine has a more limited, context-specific function. "The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson*, 468 U.S. at 533.[8] An adequate post-deprivation remedy is constitutionally sufficient in such circumstances because "in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation." *Parratt*, 451 U.S. at 541. In short, under *Parratt-Hudson*, *post*-deprivation process is constitutionally sufficient when *pre*-deprivation process is infeasible.

The same is manifestly *not* true in employment termination cases, as *Loudermill* squarely holds. See 470 U.S. at 544 ("[A]fforded the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays."). In this case, for example, the deprivation of the employee's property interest (*i.e.*, the loss of his job) was not "random and unauthorized" – as part of his role in managing the Department, the Sheriff was authorized, under appropriate circumstances, to terminate departmental employees. And because the Sheriff's decision to terminate petitioner was a foreseeable exercise of his unquestioned authority over personnel decisions, providing a meaningful pre-termination

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precisely because their conduct violated state legal requirements. The oddity of this result is strong reason to conclude that the First Circuit's interpretation is wrong.

[8] By requiring that conduct be both "unauthorized" *and* "random," this Court made clear that the *Parratt-Hudson* doctrine would not apply to unauthorized conduct that occurs with sufficient frequency to make it predictable. See *Zinermon*, 494 U.S. at 136.

hearing was clearly feasible. Indeed, state law required it. See Mass. Gen. Laws ch. 35, § 51. Consequently, the *Parratt-Hudson* doctrine had no application to this case.

The court of appeals reached the opposite conclusion only because it asked the wrong legal question. Rather than asking whether the "*deprivation*[] *of property* [was] effected through random and unauthorized conduct of a state employee," *Hudson*, 468 U.S. at 533 (emphasis added), the court asked whether the denial of a *pre-termination hearing* was "random and unauthorized." That is, the First Circuit asked whether the Sheriff was authorized to deprive petitioner of his constitutional right to a hearing, rather than asking whether the Sheriff was authorized to deprive petitioner of his state-created property interest in his job.[9] That is *not* the question under *Parratt-Hudson*, because *every* decision to violate the Constitution is unauthorized, and in many cases it will be random as well. The question instead is whether the government could reasonably be expected to anticipate petitioner's termination and provide a prior hearing. Had the court of appeals asked *that* question, it would have been compelled to conclude that the *Parratt-Hudson* doctrine provided no defense in this case.

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[9] Even if the question asked by the court of appeals was the right one, the decision to deny petitioner a pre-termination hearing was not "unauthorized" under any reasonable sense of that term in this context. This is not a case challenging the conduct of low-level prison guards, as in *Parratt* and *Hudson*. The actions of high-level policy-making officials like the Sheriff and the County Board members are attributable to the County itself. See., *e.g.*, *St. Louis* v. *Praprotnik*, 485 U.S. 112, 123 (1988) (holding that "municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability"). Their conduct should not, therefore, be considered "unauthorized" within the meaning of *Parratt-Hudson*. See *Dwyer* v. *Regan*, 777 F.2d 825, 832-33 (CA2 1985).

By asking the wrong question, the First Circuit radically transformed this Court's settled due process jurisprudence. As the court of appeals acknowledged, under its view of the doctrine, there is no federal remedy for even the clearest violation of the Due Process Clause so long as the violation arises from "a flaw in the official's conduct rather than a flaw in the state law itself." Pet. App. 13a-14a. Under this view, there would be no due process violation if, for example, law enforcement officials had incarcerated Parratt and Hudson without a trial. Such a flagrant violation of the Due Process Clause would undoubtedly violate state law and, therefore, would be considered "random and unauthorized" under the First Circuit rule. Accordingly, the First Circuit would hold in such circumstances that so long as the state provided an adequate post-imprisonment remedy (*e.g.*, a habeas or wrongful imprisonment suit), the imprisonment without trial would not violate the Due Process Clause. Or, to take a related context, the First Circuit presumably would decline to hear a claim from a resident of a state mental institution who claimed that he was institutionalized without a hearing, in violation of state commitment procedures and the Due Process Clause. Such a claim, the court would conclude, amounts to no more than the assertion that "a government official has committed a random and unauthorized act [by] misappl[ying] state law to deny an individual the process due under a correct application of state law." Pet. App. 13a. Yet, as discussed next, this Court rejected precisely that conclusion in a case decided more than fifteen years ago.

B. This Court Rejected The Same Construction Of The Parratt-Hudson *Doctrine In* Zinermon.

If there were any doubt that the First Circuit misconstrued the proper scope of the *Parratt-Hudson* doctrine, that doubt is removed by this Court's decision in *Zinermon* v. *Burch*, 494 U.S. 113 (1990), which rejected essentially the same interpretation of *Parratt* and *Hudson*.

1. In *Zinermon*, the plaintiff, Darrell Burch, was taken to a mental health facility after he was found wandering along a Florida highway. Because Burch was manifestly mentally incompetent, and therefore could not validly consent to voluntary admission to the facility, both state law and the Due Process Clause required officials to hold an involuntary admission hearing prior to subjecting Burch to institutionalization. See *id.* at 121-24; *Addington* v. *Texas*, 441 U.S. 418, 425 (1979). But rather than providing Burch the required hearing, hospital officials simply asked Burch to sign a voluntary admission form and then confined him to the facility when he complied.

Burch subsequently filed suit against the officials under Section 1983, asserting violations of his rights under the Due Process Clause. As this Court described, the district court dismissed Burch's complaint for essentially the same reasons given by the court of appeals for affirming the judgment against petitioner in this case:

> The [district] court granted that motion, pointing out that Burch did not contend that Florida's statutory procedure for mental health placement was inadequate to ensure due process, but only that petitioners failed to follow the state procedure. Since the State could not have anticipated or prevented this unauthorized deprivation of Burch's liberty, the District Court reasoned, there was no feasible predeprivation remedy, and, under *Parratt* and *Hudson*, the State's postdeprivation tort remedies provided Burch with all the process that was due him.

494 U.S. at 115.

This Court disagreed, observing that its prior cases long ago "rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the

State's common law." *Id.* at 124 (citing *Monroe* v. *Pape*, 365 U.S. 167 (1961)). The *Parratt-Hudson* doctrine did not overrule this precedent, this Court held, but rather represented an application of the ordinary due process balancing test to unique circumstances in which it was "impossible for the State to predict [the challenged] deprivations and provide predeprivation process." *Id.* at 129. On the other hand, this Court explained, in "situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at 132.[10]

In light of these principles, *Parratt-Hudson* provided no defense to the state officials' failure to provide Burch with the pre-deprivation hearing required by state law and the Due Process Clause. "First, petitioners cannot claim that the deprivation of Burch's liberty was unpredictable," because it arose during a deliberate process specifically designed to determine whether or not to admit a patient to the institution. *Id.* at 136. "Second, we cannot say that predeprivation process was impossible here." *Id.* at 136-37. Indeed, the feasibility of providing pre-deprivation process was demonstrated by the fact that state law required it. *Id.* at 136-37. "Third, petitioners cannot characterize their conduct as 'unauthorized' in the sense the term was used in *Parratt* and *Hudson*." *Id.* at 138. "The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." *Ibid.* Accordingly, this Court concluded that the "deprivation here is 'unauthorized' only in the sense that it was not an act sanctioned by state law, but,

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[10] Notably, for this proposition, the Court cited its prior decision in *Loudermill*, requiring pre-termination hearings for tenured public employees. *Ibid.*

instead, was a 'depriv[ation] of constitutional rights * * * by an official's abuse of his position.'" *Ibid.* (quoting *Monroe*, 365 U.S. at 172 n.20).

2. This case is on all fours with *Zinermon*. First, respondents cannot claim that the petitioner's termination was unpredictable, because it was entirely foreseeable that the Sheriff, as head of the department, would on occasion seek to terminate department employees. Second, providing a hearing before depriving petitioner of his property interest in his job was eminently feasible, as demonstrated by the fact that a pre-termination hearing was required both by Massachusetts law and by this Court's decision in *Loudermill*. Third, petitioners cannot reasonably "characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*," *Zinermon*, 494 U.S. at 138, given that Massachusetts law delegated to them both the power and authority to terminate department employees and "the concomitant duty to initiate the procedural safeguards set up by state law to guard against" wrongful termination. *Ibid* Respondent McDonough's conduct was only unauthorized in the same sense as the conduct in *Zinermon* – in exercising his authorized power to deprive petitioner of his job, the Sheriff failed to follow the procedures demanded by both state law and the Due Process Clause.

C. *The Court Of Appeals' Decision Conflicts With This Court's Conclusion in* Monroe *v.* Pape *That Plaintiffs May Sue State Officials For Constitutional Violations That Also Violate State Law.*

Respondents' arguments in this case also bear a striking resemblance to the arguments made to, and rejected by, this Court in *Monroe* v. *Pape*, 365 U.S. 167 (1961). In that case, police officers invaded the plaintiffs' home without a warrant and detained the father for questioning for ten hours without taking him before a magistrate or allowing him access to a lawyer. The defendants argued that their conduct was not subject to a federal remedy under 42 U.S.C. 1983 because the

officers had "no authority under state law, state custom, or state usage to do what [they] did." *Id.* at 172. The plaintiffs should not be heard to complain of this unauthorized conduct in federal court, the defendants argued, because "under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioners * * * full redress." *Id.* at 172.

This Court rejected that argument. "There can be no doubt at least since *Ex parte Virginia* that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." 365 U.S. at 171-72 (citation omitted). Moreover, this Court reasoned, Congress had exercised that power when it enacted Section 1983 without any caveat for constitutional violations that are unauthorized under state law and for which state law provides a remedy. See *id.* at 193 ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

The decision of the court of appeals here effectively nullifies *Monroe* by requiring the plaintiff to prove that the conduct that violates his due process rights was authorized under state law in order to proceed with his constitutional claim (at least when state law provides a post-deprivation process to contest the decision). Yet nothing in *Parratt* or *Hudson* indicated any intent to overrule any portion of *Monroe* or to establish a new form of immunity from suit for constitutional violations. This Court has already developed other doctrines to protect governments from liability for the unauthorized acts of their employees.[11] Government officials

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[11] The Eleventh Amendment bars constitutional claims against States without their consent, and Section 1983 does not in any event permit lawsuits against states. See, *e.g.*, *Will* v. *Mich. Dep't*

are likewise protected from unwarranted suits alleging due process violations under the doctrine of qualified immunity. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Ironically, however, while that doctrine denies immunity to officials when their conduct is in violation of clearly established law, *ibid.*, the court of appeals' construction of *Parratt-Hudson* provides an equivalent immunity *only* when the state official's conduct is so clearly illegal that it may be characterized as "unauthorized" by state law.

That incongruous result is yet another indication that the First Circuit has misconstrued the scope of the *Parratt-Hudson* doctrine. That doctrine was designed simply to avoid imposing procedural requirements that are impossible to satisfy and to avoid the prospect of federalizing common-law torts committed by state officials, a purpose for which the Due Process Clause was never intended. See *Parratt*, 451 U.S. at 544. As this Court held in *Loudermill*, however, the Due Process Clause *was* designed to ensure that before a government employer terminates an employee for cause, it takes the time to hear the employee's side of the story. 470 U.S. at 542-45.

In this case, a pre-termination hearing would have afforded petitioner a chance to demonstrate that he remained qualified for his position, despite his support for the Sheriff's political rival and despite reports the Sheriff may have

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of State Police, 491 U.S. 58, 71 (1989); *Quern* v. *Jordan*, 440 U.S. 332, 344 (1979). And while the Eleventh Amendment does not extend to local governments, this Court's decision in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), generally shields local governments from liability for the random and unauthorized actions of their employees. *Id.* at 695 (local government only liable when constitutional injury caused by "execution of a government's policy or custom"); see also *St. Louis* v. *Praprotnik*, 485 U.S. 112, 121 (1988) (same).

received from subordinates.[12] Indeed, the hearing would have provided the Sheriff the opportunity to judge the petitioner's attitude and qualifications for himself and to consider whether the dismissal was warranted. To the extent the decision was based on a perceived lack of political loyalty, petitioner would have been able to show that this reason would not constitute the type of "just cause" necessary to sustain a termination of a tenured county employee under state law[13] and was, furthermore, unnecessary in his particular case because his support for the prior sheriff would not have impeded his ability to implement the policies of the new administration. See *Loudermill*, 470 U.S. at 543 & n.8 (observing that pre-termination hearings serve to ensure informed exercise of officials' discretion). The loss of that opportunity is precisely the type of harm the Due Process Clause was intended to prevent.

D. Even If The Parratt-Hudson *Doctrine Applied In This Context, There Was No Adequate Post-Termination Remedy Available*

Even if the Sheriff's conduct in this case was considered random and unauthorized, the *Parratt-Hudson* doctrine would still have no application in a case such as this, in which the only post-deprivation remedy is a civil lawsuit seeking reinstatement.

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[12] Although respondents argued at the summary judgment stage that they were permitted under the First Amendment to terminate petitioner on the basis of political affiliation, they also asserted that, in fact, respondent McDonough terminated petitioner because he had been told by his subordinates that petitioner displayed a poor attitude during an interview. C.A. J.A. 105, 126.

[13] Even if the First Amendment did not prohibit respondents from terminating petitioner's employment because he supported the Sheriff's opponent in the prior election, state civil services law do. See *Sheriff of Plymouth County* v. *Plymouth County Pers. Bd.*, 440 Mass. 708, 714 (2004) (lack of political affiliation is not "just cause" within the meaning of the state civil service code).

Even under *Parratt* and *Hudson*, the Due Process Clause is satisfied only if the state provides "a meaningful postdeprivation remedy for the loss." *Hudson*, 468 U.S. at 533. A state that fails to provide a sufficient post-deprivation remedy violates the Due Process Clause even if no pre-deprivation remedy would have been possible. While a civil tort suit may be an adequate remedy when the state deprives an individual of a hobby kit or personal papers, that does not mean that the same post-deprivation remedy is constitutionally adequate in the employment termination context. Rather, in determining what process is due, the Court balances the government's interests against both the risk of error and the "private interest that will be affected by the official action." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In *Loudermill*, this Court recognized that in the special context of employment terminations, *no* form of *post*-termination remedy adequately balances the public and private interests at stake, given "the severity of depriving a person of the means of livelihood." *Loudermill*, 470 U.S. at 543. Indeed, the Court directly rejected the assertion that due process was satisfied by Ohio's provisions for post-termination hearings subject to judicial review. See 470 U.S. at 535-36. The post-termination remedies afforded under Massachusetts are essentially identical to the Ohio post-termination remedies found constitutionally inadequate in *Loudermill*. See Mass. Gen. Laws ch. 35, § 51 (permitting post-termination appeal to county personnel board, followed by judicial review). Accordingly, even if the Sheriff's conduct were appropriately considered "random and unauthorized" within the meaning of *Parratt-Hudson*, the doctrine still would not apply because no post-termination process can provide an adequate remedy for a wrongful termination decision.

Alternatively, even if it were possible that some form of post-termination remedy could be constitutionally sufficient under *Parratt-Hudson*, the remedy offered to petitioner in this

case was entirely inadequate. Petitioner requested, but was denied, post-termination review by the county personnel board. Pet. App. 4a. As a result, a civil suit seeking reinstatement in state court was the only remaining remedy available. See Mass. Gen. Laws ch. 35, § 51. That remedy is wholly insufficient in the employment termination context. In "determining what process is due, account must be taken of 'the *length*' and '*finality* of the deprivation.'" *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997) (emphasis in original) (citation omitted). Thus, in *Gilbert*, this Court held that an employee could be suspended temporarily without pay and without a pre-suspension hearing but only if there was substantial assurance that the suspension was not baseless or unwarranted *and* "the suspended employee receives a sufficiently prompt postsuspension hearing." *Id.* at 931-32. In this case, petitioner was not only *permanently* terminated, but faced the prospect of months or years of litigation to secure a post-termination remedy in state court. See, *e.g.*, United States Bureau of Justice Statistics, *Contract Cases in Large Counties* 7 (1992) (average duration of employment litigation in sample of state courts was 20.2 months). Such review cannot be considered "sufficiently prompt" under any reasonable definition of the term. Indeed, in *Gilbert*, this Court remanded the case for further proceedings because it was not clear whether a seventeen-day delay between suspension and hearing was "sufficiently prompt." *Id.* at 935-36. Nothing in any of this Court's cases supports the view that such a costly and time-consuming remedy comports with the requirements of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 9, 2005

APPENDIX

United States Court of Appeals

For the First Circuit

No. 04-2020

RUSSELL J. HADFIELD,

Plaintiff, Appellant,

JOSEPH M. PALOMBO; KEVIN DALTON; GEORGE B. MADSEN, JR.,

Plaintiffs,

v.

JOSEPH McDONOUGH, in his individual and official capacity as Sheriff of Plymouth County; MATTHEW HANLEY, in his individual and official capacity as Special Sheriff of Plymouth County; CHARLES LINCOLN, in his individual and official capacities; COLEMAN McDONOUGH, in his individual and official capacities; JOHN P. REARDON, in his official capacity as Commissioner of the County of Plymouth; ROBERT J. STONE, in his official capacity as County Commissioner of the County of Plymouth; PETER G. ASIAF, JR., in his official capacity as Commissioner of the County of Plymouth; JOHN F. McLELLAN, in his official capacity as the Treasurer of the County of Plymouth,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. George A. O'Toole, Jr., *U.S. District Judge*]

Before
Lynch, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Howard, *Circuit Judge*.

Ross D. Ginsberg with whom *Richard D. Vetstein* and *Gilman, McLaughlin & Hanrahan, LLP* were on brief for appellant.

Kevin F. Moloney with whom *Roger T Manwaring, Barron & Stadfeld, P.C., Thomas M. Hoopes* and *Kelly, Libby & Hoopes, P.C.* were on brief for appellee Joseph F. McDonough.

Kenneth H. Anderson with whom *Thomas Drechsler* and *Finneran, Byrne & Drechsler, L.L.P.* were on brief for appellees Matthew Hanley, Charles Lincoln and Coleman McDonough.

May 11, 2005

HOWARD, *Circuit Judge*. In November 2000, Joseph McDonough defeated incumbent Charles Decas for the office of Plymouth County Sheriff. Shortly after assuming office, McDonough fired Russell J. Hadfield from his position as Assistant Deputy Superintendent in Field Services for Training ("ADS for Training"). Hadfield brought this federal action claiming that the termination violated his constitutional rights. He alleged that the Sheriff and three of his associates, Coleman McDonough, Matthew Hanley, and Charles Lincoln, unlawfully fired him on account of his support for Decas in the 2000 election. He also alleged that the Sheriff and the Plymouth County Commissioners illegally denied

him a hearing concerning his termination in violation of his due process rights. The district court awarded all defendants summary judgment. We affirm.

I.

We present the facts in the light most favorable to Hadfield. *See O'Neill* v. *Baker*, 210 F.3d 41, 44 (1st Cir. 2000). The Plymouth County Massachusetts Sheriff's Department has three primary responsibilities. It operates the Plymouth County Correctional Center, provides support to local police and fire departments, and oversees the service of civil process and other legal documents. The Department is headed by a popularly elected Sheriff and employs over 500 people. Hadfield worked for the Department in various capacities from 1983 until his termination. In May 2000, Hadfield was made ADS for Training, a position in which he was supervised by the Department's Director of Training. Among his duties, Hadfield supervised instructors, developed resources, arranged classes, researched curricula, and taught various courses.

In the period before the November 2000 election, Hadfield worked for Decas' reelection. To help in the effort, Hadfield held Decas signs at various rallies. On November 4, 2000, on his way to a Decas rally, Hadfield passed a rally at which he noticed many people holding signs supporting McDonough. Hadfield attended this rally while holding a Decas sign. At the rally, Hadfield was approached by two of McDonough's supporters, Charles Lincoln and Coleman McDonough. After telling Hadfield that he should not be attending the rally, Coleman McDonough told Hadfield, "Bad move, Bubba, bad career move." In a similarly threatening vein, Lincoln told Hadfield, "You weren't even on the list. Now you're at the top of the list."

After McDonough took office in December 2000, he initiated a Department reorganization. As part of this process, he and his staff interviewed senior holdovers from the prior administration, including the Assistant Deputy

Superintendents. Hadfield's interview took place in February 2001. Soon thereafter, Hadfield received a letter from McDonough informing him that he was immediately discharged from his post as ADS for Training.

McDonough did not provide Hadfield with notice or a hearing before taking this action. After receiving the termination letter, Hadfield sent a written hearing request to the Plymouth County Board of Commissioners, which serves as the county personnel board. The Commissioners denied Hadfield's request. Hadfield did not appeal this decision to the Massachusetts state courts.

Instead, in April 2001, Hadfield filed this 42 U.S.C. § 1983 action claiming political discrimination in violation of the First Amendment and the denial of procedural due process in violation of the Fourteenth Amendment. After a period for discovery, all defendants moved for summary judgment.

The discrimination defendants argued that Hadfield occupied a position for which political affiliation was a requirement and that he therefore was not entitled to bring a claim of unlawful political discrimination. *See, e.g.*, *Galloza* v. *Foy*, 389 F.3d 26, 28 (1st Cir. 2004) (stating that the First Amendment protection against politically motivated discharges does not extend to positions for which political affiliation is an appropriate requirement). The due process defendants argued that Hadfield was not entitled to a hearing because he did not have a property interest in continued employment under Massachusetts law, and that, even if he did have a right to hearing, his due process claim is barred by the so-called *Parratt-Hudson* doctrine. *See Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Hudson* v. *Palmer*, 468 U.S. 517 (1984) (stating that a federal procedural due process claim may not be based on the random and unauthorized conduct of government officials so long as the state has provided an adequate postdeprivation remedy).

In a brief order, the district court awarded summary judgment for all defendants. The court agreed with the

discrimination defendants that political loyalty was a legitimate job requirement for the position of ADS for Training. As to the procedural due process claim, the court concluded that, even if Hadfield was entitled to a hearing, his federal rights were not violated because any deprivation of process to which Hadfield was entitled resulted from random and unauthorized conduct and the state provided adequate postdeprivation remedies. This appeal followed.

II.

A. Standard of Review

We review the entry of summary judgment *de novo*, viewing the record in the light most hospitable to the party opposing summary judgment. *See Padilla-García* v. *Guillermo Rodríguez*, 212 F.3d 69, 73 (1st Cir. 2000). We do not credit "conclusory allegations, improbable inferences, and unsupported speculation" in this analysis. *Medina-Muñoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). Summary judgment is proper only if the record, read favorably to the non-moving party, reflects no genuine issues of material fact and the undisputed facts indicate that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

B. Political Discrimination

We begin by considering whether the discrimination defendants met their summary judgment burden of demonstrating that the ADS for Training was a position for which political affiliation was an appropriate basis for dismissal.[1] As mentioned above, we perform this analysis by drawing all reasonable inferences in favor of Hadfield. But the question of whether a position is subject to political discharge is a legal question for the court, even if it presents a close call. *See Flynn* v. *City of Boston*, 140 F.3d 42, 44 (1st

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[1] The defendants denied that, in fact, they dismissed Hadfield because of his political views but assumed that this is a trialworthy issue for purposes of their summary judgment argument.

Cir. 1998); *McGurrin Ehrhard* v. *Connolly*, 867 F.2d 92, 93 (1st Cir. 1989).

The First Amendment right to association includes a qualified right to be free from discharge from public employment merely because of political affiliation. *See Elrod* v. *Burns*, 427 U.S. 347, 359-60 (1976). But the right does not extend to all public employees. *See id.* at 360. In *Elrod*, the Court recognized that the wholesale protection of public employees could undermine representative government by forcing those who win elective office to employ individuals who disagree with the prevailing candidate's (and presumably the electorate's) goals. *See id.* at 367; *Flynn*, 140 F.3d at 46. To permit the prevailing candidate sufficient leeway to enact his or her programs, individuals in policymaking and confidential positions were held to be excluded from the prohibition against politically motivated discharges. *See Elrod*, 427 U.S. at 367 & 375.

Four years later, in *Branti* v. *Finkle*, 445 U.S. 507, 518 (1980), the Court reaffirmed the constitutional protection against patronage dismissals but expanded upon the "policymaker/confidential employee" test. The Court instructed that a public employee is not protected from a politically motivated discharge if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.*

After *Branti*, this court and others have engaged in the process of developing a somewhat evolving standard for identifying those positions that fit within the exception articulated by the Supreme Court. *See Flynn*, 140 F.3d at 45 (describing the "porridge" of general statements and tests that have been applied in the wake of *Branti*). We have tended to ask (1) if the position deals with issues over which there can be partisan differences and (2) if the specific responsibilities of the position resemble those of a policymaker or other officeholder whose functions are such that party affiliation is

an appropriate criterion for holding the post. *See Galloza*, 389 F.3d at 29. We have recognized, however, that deciding whether a position is protected from political discharge is not "a matter of inserting variables into a known equation." *Id.* Rather, it requires a court to look closely at the position to identify its inherent duties and then to make a judgment about whether the position is one for which political affiliation is an appropriate requirement. *See Duriex-Gauthier* v. *Lopez-Nieves*, 274 F.3d 4, 10-11 (1st Cir. 2001).

With that said, our cases do yield some general principles which help demarcate the line between protected and non-protected positions. In *Flynn*, we surveyed our precedents to conclude that "the cases have regularly upheld against First Amendment challenge the dismissal on political grounds of mid- or upper-level officials or employees who are significantly connected to policymaking." 140 F.3d at 45. We explained that an employee is not immune from termination merely because the employee "stands apart from partisan politics," is not the ultimate decisionmaker in the agency, or is guided in some responsibilities by technical or professional standards. *Id.* at 46. "It is enough that the official [is] involved [in policy], if only as an adviser, implementer or spokesperson." *Id.*[2]

Application of our cases convinces us that political affiliation is an appropriate requirement for the position of ADS for Training. The Sheriff is involved in several areas which can be affected by partisan divisions. The Sheriff runs

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[2] These principles have led to rulings dismissing political discharge cases when brought by mid- to upper-level employees including a regional director of an administrative agency, the municipal secretary in a mayor's office, an officer in charge of human resources, a director of public relations, a superintendent of public works, and a director of a city's office of federal programs. *See Flynn*, 140 F.3d at 45. They have also yielded rulings permitting claims to proceed by lower-level employees including a cleaning supervisor and a career administrative aide. *See id.*

a prison and therefore must make numerous politically-influenced decisions about prison operations and the treatment of inmates -- some or many of which decisions could be the subject of partisan political contention. These decisions are embodied in Department policies and directives which are put into effect by Department employees working directly within the prison. These employees, in turn, learn about the new policies and directives primarily through training. The Sheriff's efforts to implement his agenda could therefore be frustrated by a training program which does not accurately reflect his views.

The ADS for the Training is a high-ranking employee in this politically important branch of the Department. According to the formal job description,[3] the ADS for Training supervises and directs the training program for Department personnel; develops instructor resources; arranges for classes and seminars; researches curricula, methods, policies, and procedures pertinent to training; develops and administers evaluative testing; instructs certain training courses; coordinates use of department training resources; assures that instructors meet training certification requirements; and develops the training schedule based on the availability of personnel.

In our view, this job description demonstrates that the ADS for Training is an "adviser, implementer, [and] spokesperson" concerning Department policy. *Flynn*, 140 F.3d at 46. The position's duties include researching methods, policies and procedures related to training and developing instructor resources. These duties illustrate that the ADS for Training works independently to revise and improve the training program. Indeed, Hadfield acknowledged that he advised the Director of Training (to

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[3] We have observed that the job description is the best, and sometimes dispositive, source for identifying the functions of the position. *See Duriex-Gauthier*, 274 F.3d at 8; *Roldan-Plumey* v. *Cerezo-Suarez*, 115 F.3d 58, 64-65 (1st Cir. 1997).

whom he reported) concerning proposed changes in training operations. There is no dispute then that the ADS for Training advises on training policy.

The ADS for Training is also a policy implementer. Subject to only "general supervision," the ADS for Training "supervises and directs the training program" for his or her assigned program areas within the Department. Open-ended responsibilities are a telltale sign that the position includes a policy implementing function. *See Galloza*, 389 F.3d at 32; *Duriex-Gauthier*, 274 F.3d at 10.

Finally, the ADS for Training acts as an internal spokesperson for the Sheriff. The officeholder is responsible for instructing certain courses and supervising the instructors. In these roles, the ADS for Training acts as the Sheriff's spokesperson by representing the Sheriff's views to the rank and file and to his subordinate instructors. *See Vazquez Rios* v. *Hernandez Colon*, 819 F.2d 319, 328 (1st Cir. 1987) (stating that a job requiring an officeholder to act as spokesperson for political official could not be done effectively except by one who shared the [official's] political beliefs). Hadfield acknowledges that he represented the views of the Sheriff as part of his duties.

The duties of the ADS for Training resemble other mid- to upper-level positions for which we have held political affiliation is an appropriate requirement. *See supra* n.2. For example, we held that the head of the Personnel and General Services Office in the Puerto Rico Office of the Ombudsman was a policymaking position. *See Duriex-Gauthier*, 274 F.3d at 10. We relied on the position's open-ended responsibilities for "planning and supervision of personnel activities" and the fact that the officeholder reported to those in the upper echelons of the agency. *Id.* Similarly, in *Flynn*, we held that the associate director for field operations of the Boston Community Centers was not protected from a political discharge. 140 F.3d at 45. The duties of that position included overseeing several programs, acting as a liason to

other agencies, and maintaining agency compliance with legal duties. *See id.*

Despite the policymaking or implementing duties inherent in the ADS for Training position, Hadfield contends that, in fact, he served in a primarily administrative role, and that the policy aspects of the training program were handled by the Director of Training. But the fact that Hadfield may not have been involved in such activities in the prior administration is of little significance. His job description could be read to encompass participation in policymaking and political affairs, and the Sheriff, in forming his new administration, could be frustrated by an ADS for Training whose view varied from the Sheriff's. A new administration should not be overly hamstrung in filling key positions with loyal employees simply because of the way the prior administration operated. *See Galloza*, 389 F.3d at 31 (stating that "the goal of the [*Branti*] analysis is not to shackle a new administration"). This is why the *Branti* analysis eschews reliance on "what functions a particular occupant of the position may in fact carry out from time to time" in favor of focusing on "the essential attributes of the position." *Id.* at 30.

Moreover, as we have already stated, an employee is not protected merely because he is a "subordinate within [his] own office[]." *Flynn*, 140 F.3d at 45 & 46. It is sufficient that an officeholder is responsible for implementing policies that derive from partisan decisions made by others.[4] *Id.* at 46. "These major responsibilities mean[] that political disagreements [between the ADS for Training] and his politically appointed [superiors] could lead to less effective implementation of political goals."[5] *Id.* at 45.

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[4] Of course an employee who merely implements policy is not thereby converted into one for whom political affiliation is a reasonable requirement.

[5] Hadfield also argues that summary judgment should have been denied because a Massachusetts Supreme Judicial Court decision holds that the position of classification and treatment

In sum, the evidence demonstrates that the ADS for Training is at or near the top of the Department's training program. The officeholder has broad power to advise policymakers, to implement policy, and to act as a spokesperson for the Sheriff to rank and file personnel. Because the training program is critical to the Sheriff's ability to implement his agenda, it is reasonable for the Sheriff to fill this position with an individual whom he believes is committed to his program. We therefore conclude that political affiliation is an appropriate requirement for the ADS for Training and that the district court correctly granted the discrimination defendants summary judgment on Hadfield's First Amendment claim.

C. Procedural Due Process

Hadfield alleges that the due process defendants violated his right to procedural due process by denying him a hearing concerning his termination. The due process defendants contend that Hadfield was not entitled to a hearing because he

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director within the Plymouth County Sheriff's Department was not a policymaking position because the position retained civil service protection under Massachusetts law. *See Sheriff of Plymouth County* v. *Plymouth County Personnel Bd.*, 802 N.E.2d 71, 76 (Mass. 2004). Hadfield contends that because the "director" classification is higher than his "assistant deputy sheriff" classification, his position also cannot be deemed as policymaking. There are two flaws in this argument. Neither the SJC decision nor Hadfield has provided information concerning the duties which the classification and treatment director performs. Without a description of the position's duties, we cannot discern whether it involves the kind of functions which we have concluded qualifies Hadfield's position as one for which political affiliation is an appropriate requirement. *See Flynn*, 140 F.3d at 44 (explaining that in the *Branti* analysis "duties prevail over titles"). Moreover, the SJC's analysis equated the definition of policymaking with the position's civil service status under Massachusetts law. But the state law classification of a position is not determinative in the *Branti* analysis. *See, e.g., Jimenez Fuentes*, 807 F.2d at 246.

did not have a property interest in continued employment. They also argue that, even if they were wrong in this respect, the *Parratt-Hudson* doctrine bars Hadfield's claim.

Hadfield's claim depends on him having a property right in continued employment. *See Bd. of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972). If he did, he could not be discharged without due process which, in the employment context, includes the right to a predeprivation hearing. *See Cleveland Bd. of Ed.* v. *Loudermill*, 470 U.S. 532, 538-42 (1985). Whether Hadfield possessed a property interest in his employment is a matter of Massachusetts law. *See id.* at 538

The due process defendants argue that Hadfield did not have a property interest in continued employment (and thus was not entitled to a hearing) because his employment was governed by Mass. Gen. Laws ch. 126, § 8A. This statute provides that any deputy superintendent appointed by the Sheriff for employment in the house of corrections serves at the pleasure of the Sheriff and is exempt from civil service protection. Hadfield counters that his employment was governed by Mass. Gen. Laws ch. 35, § 51 which provides covered employees with civil service protection. Under this statute, covered employees may not be terminated without receiving notice and a hearing from the appointing authority. In addition, they may appeal the appointing authority's decision to the county personnel board and, if still dissatisfied, to the state courts. As part of the appeal, an aggrieved employee may claim that he was denied the requisite process, including the complete denial of a hearing. *See Puorro* v. *Commonwealth*, 794 N.E.2d 624, 628 (Mass. App. Ct. 2003) (holding that deputy sheriff, who was terminated without a hearing, could, as part of an appeal under Mass. Gen. Laws ch. 35, § 51, claim that he was denied a hearing because he was misclassified as a non-covered employee). A prevailing employee may obtain reinstatement and recover backpay.

Because we conclude that Hadfield's claim is barred by the *Parratt-Hudson* doctrine, we do not decide Hadfield's

proper employment classification under Massachusetts law. We assume *arguendo* that Hadfield possessed a property interest in continued employment and the concomitant right to a hearing concerning his termination.

We have summarized the *Parratt-Hudson* doctrine as follows:

> When a deprivation of a property interest is occasioned by random and unauthorized conduct by state officials, the Supreme Court has repeatedly emphasized that the due process inquiry is limited to the issue of the adequacy of the postdeprivation remedies provided by the state.

O'Neill v. *Baker*, 210 F.3d 41, 40 (1st Cir. 2000) (quoting *Lowe* v. *Scott*, 959 F.2d 323, 340 (1st Cir. 1992) (alterations in *O'Neill* omitted). *Parratt-Hudson* shields a public entity from a federal due process claim where the denial of process was caused by the random and unauthorized conduct of government officials and where the state has provided adequate postdeprivation remedies to correct the officials' random and unauthorized acts. *See Mard* v. *Town of Amherst*, 350 F.3d 184, 193 (1st Cir. 2003); *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 536-37 (1st Cir. 1995). The doctrine thus permits "procedural claims to be resolved in state forums where states . . . provide adequate remedies." *O'Neill*, 210 F.3d at 50.

Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. *See O'Neill*, 210 F.3d at 50; *Herwins* v. *City of Revere*, 163 F.3d 15, 19 (1st Cir. 1998); *Cronin* v. *Town of Amesbury*, 81 F.3d 257, 260 (1st Cir. 1996) (per curiam); *Brown*, 68 F.3d at 536-37; *Lowe*, 959 F.2d at 344. In other words, conduct is "random and unauthorized" within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct

rather than a flaw in the state law itself.[6] *See Herwins*, 168 F.3d at 19 (stating that, but for *Parratt-Hudson*, "federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances").

We have applied this doctrine in the public employment context. In *Cronin*, we rejected an employee's procedural due process claim because the claim was not directed at the sufficiency of the statutorily provided pretermination procedures, but rather at the conduct of the government officials charged with implementing the procedures. 81 F.3d at 260 & n.2. Similarly, in *O'Neill*, we rejected an employee's procedural due process claim based on the failure of a state actor to provide an employee with the statutorily required pretermination notice. 210 F.3d at 50. We explained that "state law clearly provid[ed] for adequate notice and there [was] no suggestion that either by formal or informal means the state ha[d] authorized the giving of inadequate notice to persons who may be terminated, or that this was any form of regular practice." *Id.*; *see also Learnard* v. *Inhabitants of Town of Van Buren*, 182 F. Supp. 2d 115, 1124-25 (D. Me. 2002) (applying *Parratt-Hudson* and First Circuit precedent to reject an employee's procedural due process claim based on the denial of a hearing because state law provided that the employee had a property interest in continued employment).

Here, Hadfield was denied a hearing because the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not

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[6] Hadfield cites to cases from other courts which have taken a narrower view of "random and unauthorized conduct," *see, e.g.*, *Honey* v. *Distelrath*, 195 F.3d 531, 533-34 (9th Cir. 1999), but acknowledges that we have adopted a broader view described above.

discretionary or governed by a formal or informal policy.[7] *Cf. Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990) (holding that the *Parratt-Hudson* doctrine does not apply where the denial of predeprivation process resulted from the state-sanctioned discretion of the official to decide what process is necessary); *O'Neill*, 210 F.3d at 50 (stating that the doctrine may not apply when unlawful conduct is in accord with informal policy). Rather, if error, it was simply a misapprehension of state law. This is the sort of random and unauthorized conduct to which *Parratt-Hudson* applies. *See Herwins*, 163 F.3d at 19.

Having concluded that any deprivation of process was caused by random and unauthorized conduct by the due process defendants, we turn to whether Massachusetts law provided Hadfield with an adequate postdeprivation remedy. We have previously considered this issue under an almost identical Massachusetts statute. *See Cronin*, 81 F.3d at 260. In *Cronin*, we found that a Massachusetts civil service statute, which allowed a terminated employee to appeal the termination decision to the civil service commission and the state superior court (and, if successful, to obtain reinstatement and backpay) provided a sufficient postdeprivation remedy. *See id.* (discussing Mass. Gen. Laws ch. 31, § 44); *see also Herwins*, 163 F.3d at 19-20 (stating that administrative and judicial review is the "conventional regime" for remedying erroneous decisions by state officials and thus constitutes adequate postdeprivation process). The statute at issue in this case is materially indistinguishable, *see* Mass. Gen. Laws ch. 35, § 51, and therefore provided Hadfield with an adequate postdeprivation remedy for purposes of *Parratt-Hudson*. Hadfield chose not to pursue his postdeprivation remedy in state court, but there is no dispute that it was

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[7] Whether an employee is entitled to a hearing under Massachusetts law is a matter of statutory construction, not administrative discretion. *See Hogarth* v. *Sheriff of Suffolk County*, 564 N.E.2d 397, 398-99 (Mass. App. Ct. 1990).

available to him. *See Herwins*, 163 F.3d at 19 (stating that it "makes no sense" to permit a plaintiff to pursue a federal due process claim after ignoring the "state provided procedural remedy"). Accordingly, the district court correctly awarded the due process defendants summary judgment.

III.

For the reasons stated, the district court's judgment is ***affirmed.***

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-CV-10563-GAO

JOSEPH M. PALOMBO, KEVIN DALTON, GEORGE B. MADSET, JR., and RUSSELL J. HADFIELD,
Plaintiffs

v.

JOSEPH F. MCDONOUGH in his Individual Capacity and as Sheriff of Plymouth County; MATTHEW HANLEY in his Individual Capacity and as Special Sheriff of Plymouth County; CHARLES LINCOLN and COLEMAN MCDONOUGH, in their Individual and Official Capacities; and JOHN P. RIORDAN, ROBERT J. STONE and PETER ASIAF, JR. in their Official Capacity as County Commissioners of the County of Plymouth,
Defendants

ORDER
October 22, 2003

O'TOOLE, D.J.

On defendants' motions for summary judgment, the Court orders as follows:

1) Defendants' motions for summary judgment are GRANTED as to Plaintiff Russell Hadfield's claim under Count 1 (First Amendment violations) because (1) political loyalty is a legitimate job requirement for the position of Assistant Deputy Superintendent-Training, and (2) Hadfield's counsel conceded at the hearing on defendants' motions for summary judgment that Hadfield suffered no separate harm as a result of the termination of his commission to serve as a Deputy Sheriff.

2) Defendants Joseph McDonough's and Matthew Hanley's motions for summary judgment are DENIED as to plaintiffs Joseph Palombo's, Kevin Dalton's, and George Madsen's claims under Count 1 (First Amendment violations) because political loyalty is not a legitimate job requirement for the position of Deputy Sheriff, and sufficient factual disputes exist to warrant a trail on plaintiffs' claims.

3) Defendants Charles Lincoln's and Coleman McDonough's motion for summary judgment is GRANTED as to plaintiff's Palombo's, Dalton's, and Madsen's claims under Count 1 (First Amendment violations) because, although political loyalty is not a legitimate job requirement for the position of Deputy Sheriff, there is insufficient evidence to support an inference that defendants Charles Lincoln and Coleman McDonough took part in the decision to decommission plaintiffs Palombo, Dalton, or Madsen.

4) Defendants' motions for summary judgment are GRANTED as to all plaintiffs' claims under Count 2 (procedural due process violations). Assuming, without deciding, that plaintiffs were entitled to the protections of Mass. Gen. Law ch. 35, § 51 and had a constitutionally-protected property interest in continued employment, plaintiffs' due process claims fail under the *Parratt-Hudson* doctrine. *See, e.g., Lowe v. Scott*, 959 F.2d 323, 340 (1st Cir. 1992) (*Parratt* and *Hudson* teach that if a state provides adequate postdeprivation remedies – either by statute or through the common-law tort remedies available in its courts – no claim of a violation of procedural due process can be brought under § 1983 against the state officials whose random and unauthorized conduct occasioned the depreivation.").

5) Defendants' motions for summary judgment are DENIED to the extent that they rely on claims of Eleventh Amendment immunity. The Plymouth County Sheriff's Department is not an arm of the state.

6) Defendants' motions for summary judgment are DENIED to the extent that they rely on claims of qualified immunity.

7) As the Court reads plaintiffs' complaint and the motion papers, plaintiffs do not make any claims against defendants John Riordan, Robert Stone, Peter Asiaf, and John McLellan in their individual capacities. To the extent that plaintiffs assert such claims, they are without merit, and defendants Riordan's, Stone's, Asiaf's, and McLellan's motion for summary judgment is GRANTED as to any claims against them in their individual capacities. Defendants Riordan, Stone, Asiaf, and McLellan shall remain defendants in their official capacities only to the extent that they may be necessary parties to effect relief against the county, if any is warranted.

8) As previously scheduled, the Court will conduct a final pre-trial conference on October 28, 2003, and a trail will begin on November 10, 2003 on the claims of plaintiffs Palombo, Dalton and Madsen, and against defendants Joseph McDonough, Matthew Hanley, John Riordan, Robert Stone, Peter Asiaf, and John McLellan as to Count 1 (First Amendment violations).

It is SO ORDERED.

October 22, 2003
Date

George A. O'Toole, Jr.
DISTRICT JUDGE

(1)

No. 05-214

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

RUSSELL J. HADFIELD,

Petitioner,

v.

JOSEPH F. MCDONOUGH, in his individual and official capacity as Sheriff of Plymouth County, Massachusetts, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit correctly ruled that the *Parratt-Hudson* doctrine bars Petitioner's procedural due process claim where Petitioner does not allege any flaw in the state's statutory pre-termination of employment process requirements but does allege that the conduct causing the alleged deprivation was intentional and violated the established, non-discretionary state law which, if followed, would have provided adequate pre-deprivation process, and where the state has provided an adequate post-deprivation remedy.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, defendants in the district court included Matthew Hanley, individually and as Special Sheriff of Plymouth County; Coleman McDonough and Charles B. Lincoln, individually and in their official capacities at the Plymouth County Sheriff's Department; John P. Riordan, Robert J. Stone, and Peter G. Asiaf, Jr., as County Commissioners of Plymouth County; and John F. McLellan, as Treasurer of Plymouth County.

All claims against defendants Charles B. Lincoln and Coleman McDonough were dismissed voluntarily in the district court, and the procedural due process claims against Special Sheriff Hanley also were dismissed voluntarily in the district court.

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RELEVANT CONSTITUTIONAL PROVISION AND STATUTES

U.S. Const. amend. XIV

42 U.S.C. § 1983

Massachusetts G.L. c. 35, § 51

Massachusetts G.L. c. 126, § 8A

STATEMENT OF THE CASE

Several months before the November 2000 election of respondent Joseph F. McDonough ("Sheriff McDonough") as Sheriff of Plymouth County, Massachusetts, petitioner Russell J. Hadfield ("Hadfield"), in May 2000, resigned voluntarily from his position at the Plymouth County Sheriff's Department ("PCSD" or the "department") as Captain-Field Services, in order to accept an appointment by then Sheriff Charles Decas ("Decas") as Assistant Deputy Superintendent-Training ("ADS-Training"). At the time, Hadfield expressly acknowledged in writing[1] his "agree[ment] and understand[ing]" that in the new position, he would not have any rights under Massachusetts G.L. c. 35, § 51[2] to, among other things, termination for "just cause," notice and a pre-termination hearing, because the ADS-Training position was subject, instead, to Massachusetts G.L. c.

[1] Letter, dated April 28, 2000, from the PCSD Director of Human Resources to, and on May 11, 2000, endorsed and returned by, Hadfield, Court of Appeals Jt. Appendix ("C.A. Jt. App.") p. 567; Affidavit of John Cristiani, ¶3, C.A. Jt. App. 563-64.

[2] Respondents' Appendix ("Resp. App.") 4.

126, § 8A,[3] which provides that persons subject to § 8A serve "at [the] pleasure" of the county sheriff.

In February 2001, soon after Sheriff McDonough had assumed office, the PCSD conducted a series of interviews of the senior staff of the department, including, among others, all PCSD Directors and Assistant Deputy Superintendents, which resulted in the retention of numerous PCSD officials and employees despite their support for Decas against Sheriff McDonough in the recent election campaign.[4] After Hadfield's interview by the PCSD Chief of Staff and the PCSD Director of Human Resources, Hadfield's employment was terminated on February 22, 2001,[5] because, as Sheriff McDonough testified, he "lacked confidence" in Hadfield due to his poor performance in what even Hadfield himself admitted had been a "bad interview."[6] [7] There is no evidence in the record that the respondent county commissioners participated in any way in Sheriff McDonough's termination of Hadfield as ADS-Training without a pre-termination hearing.

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[3] Resp. App. 7.

[4] Sheriff McDonough deposition ("dep."), April 28, 2003, p. 153, ll. 8-13, C.A. Jt. App. 276; *id.* at p. 158, ll. 14-18, C.A. Jt. App. 278; *id.* at p. 162, ll. 14-24, C.A. Jt. App. 279; *id.* at p. 163, ll. 23-24, p. 164, ll. 1-3, C.A. Jt. App. 279; *id.* at p. 167, ll. 1-13, C.A. Jt. App. 280; *id.* at p. 167, ll. 14-22; C.A. Jt. App. 280.

[5] Hadfield dep., April 7, 2003, p. 90, ll. 15-21, C.A. Jt. App. 312 p. 111, ll. 22-24, p. 112, ll. 1-2, p. 113, ll. 22-24, C.A. Jt. App. 314; p. 114, ll. 1-4, C.A. Jt. App. 315; Hadfield dep., April 9, 2003, p. 272, ll. 13-20; p. 273, ll. 20-23, C.A. Jt. App. 333; Sheriff McDonough's answ. to int. No. 2.3, C.A. Jt. App. 432-33.

[6] Sheriff McDonough dep., April 28, 2003, p. 178, ll. 22-24; C.A. Jt. App. 282; Sheriff McDonough's answ. to int. No. 2.3, C.A. Jt. App. 432-33.

[7] Hadfield dep., April 9, 2003, p. 293, ll. 12-14; C.A. Jt. App. 334.

By letter, dated February 28, 2001,[8] Hadfield requested a hearing before the commissioners. They rejected his request on the grounds that he was an at-will employee serving at the pleasure of the sheriff, whose status, as Hadfield had acknowledged on May 11, 2000, was governed by Massachusetts G.L. c. 126, § 8A, and under that statute, the commissioners lacked jurisdiction to conduct a hearing.[9]

The denial of a post-termination hearing by the commissioners triggered any right Hadfield may have had to proceed in state court to seek "reinstatement" to his position "without loss of compensation," if, as he claims, he was entitled to the protection of Massachusetts G.L. c. 35, § 51. *See Puorro* v. *Commonwealth*, 59 Mass. App. Ct. 61, 794 N.E.2d 624 (2003). He did not do so.

Instead, even though Sheriff McDonough had retained numerous PCSD officials and employees who had supported Decas in the election campaign,[10] Hadfield and three former civil process deputy sheriffs, brought suit in the district court under 42 U.S.C. § 1983 claiming that their First Amendment rights had been violated when the plaintiff civil process deputies had been decommissioned by Sheriff McDonough and when Hadfield's employment as ADS-Training had been terminated, allegedly because of their election campaign support for Decas. They also alleged violations of their Fourteenth Amendment procedural due process rights when they were decommissioned or terminated, as the case may be, without a pre-termination hearing to which they alleged they were entitled under Massachusetts G.L. c. 35, § 51.

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[8] C.A. Jt. App. 217.

[9] Letter, March 20, 2001, to Hadfield, C.A. Jt. App. 218.

[10] *See* note 4, *supra*.

Hadfield did not allege, and there is no evidence in the record, that there had been an established formal or informal state, county or PCSD procedure, policy or custom of denying a pre-termination hearing to a PCSD employee entitled to the protection of Massachusetts G.L. c. 35, § 51. Nor did Hadfield allege that the pre-termination requirements of G.L. c. 35, § 51 were constitutionally deficient.

The district court allowed respondents' motions for summary judgment on Hadfield's First Amendment claims[11] and, on the procedural due process claims, the district court ruled:

> Assuming, without deciding, that plaintiffs were entitled to the protections of [Massachusetts G.L. c. 35, § 51] and had a constitutionally-protected property interest in continued employment, plaintiffs' due process claims fail under the *Parratt Hudson* doctrine. *See Lowe* v. *Scott*, 959 F.2d 323, 340 (1st Cir. 1992).[12]

Hadfield appealed the district court's rulings on both his First and Fourteenth Amendment claims to the United

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[11] The district court held that "political loyalty is a legitimate job requirement for the position of [ADS]-Training," C.A. Jt. App. 1259-60, but denied the motion as to the other plaintiffs' First Amendment claims "[b]ecause political loyalty is not a legitimate job requirement for the position of Deputy Sheriff and sufficient factual disputes exist to warrant a trial on plaintiffs' claims." *Id.* Those claims were tried to a jury in the district court, which, on January 28, 2004, returned verdicts against them. C.A. Jt. App. 39.

[12] C.A. Jt. App. 1260. The district court explained that "*Parratt* and *Hudson* teach that if a state provides adequate postdeprivation remedies – either by statute or through the common-law tort remedies available in its courts – no claim of a violation of procedural due process can be brought under § 1983 against the state officials whose random and unauthorized conduct occasioned the deprivation." *Id.*

States Court of Appeals for the First Circuit, C.A. Jt. App. 1300, which affirmed the district court's decisions on both claims. 407 F.3d at 21. The other plaintiffs did not appeal.

The circuit court held that Hadfield's procedural due process claim was barred by the *Parratt-Hudson* doctrine, and, accordingly, did "not decide Hadfield's proper employment classification under Massachusetts law." 407 F.3d at 19.[12] Instead, it assumed, *arguendo*, that Hadfield had a property interest in continued employment under Massachusetts G.L. c. 35, § 51. *Id.*

The circuit court summarized the holdings of this Court in *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), stating that the *Parratt-Hudson* doctrine,

> shields a public entity from a federal due process claim where the denial of process was caused by the random and unauthorized conduct of government officials and where the state has provided adequate post-deprivation remedies to correct the officials' random and unauthorized acts.

407 F.3d at 19-20.

> Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. [Citations omitted.] In other words, *conduct is "random and unauthorized"*

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[12] Sheriff McDonough and the commissioners contended below that Hadfield was an at will employee covered by Massachusetts G.L. c. 126, § 8A, and therefore did not have G.L. c. 35, § 51 rights to termination for cause and a pre-termination hearing. *See Looney* v. *Flynn*, 1990 WL 252170 (D. Mass. December 21, 1990) (An Assistant Deputy Superintendent in a Massachusetts county sheriff's department serves "at the Sheriff's pleasure" under Massachusetts G.L. c. 126, § 8A.)

> *within the meaning of Parratt-Hudson when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself.* [Footnote omitted.]

Id. (Emphasis added.) The court restated what it had said in *Herwins* v. *City of Revere*, 168 F.3d 15, 19 (1st Cir. 1998), that "but for" the *Parratt-Hudson* doctrine,

> "federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances."

Id.

The circuit court distinguished *Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990), finding that, unlike the Florida officials in *Zinermon*, Sheriff McDonough had no "state sanctioned discretion" whether to grant Hadfield a pre-termination hearing. The circuit court said,

> Hadfield was denied a hearing because *the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not discretionary or governed by a formal or informal policy.* [Footnote omitted.] *Cf. Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990) (holding that the *Parratt-Hudson* doctrine does not apply where the denial of predeprivation process resulted from the state-sanctioned discretion of the official to decide what process is necessary). . . . *Rather, if error, it was simply a misapprehension of state law. This is the sort of random and unauthorized conduct to which Parratt-Hudson applies.* . . .

407 F.3d at 20. (Emphasis added.)

Because Massachusetts G.L. c. 35, § 51 provides a "sufficient postdeprivation remedy," the circuit court held that the district court's entry of summary judgment

against Hadfield and in favor of respondents on Hadfield's procedural due process claim was correct. 407 F.3d at 21.

REASONS FOR DENYING THE WRIT

Petitioner Hadfield claims that the circuit court's application of the *Parratt-Hudson* doctrine to dismiss his § 1983 procedural due process claim is at odds with this Court's rulings in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985) and *Zinermon*, which he claims is "indistinguishable" from the present case. In addition, Hadfield argues that this Court should grant certiorari in order to resolve a split among the circuits in the way they apply the *Parratt-Hudson* doctrine. He also argues that the post-termination remedy under Massachusetts G.L. c. 35, § 51 is not adequate.

This Court should deny the Writ because the First Circuit's application of the *Parratt-Hudson* doctrine in this case is entirely consistent with this Court's precedent and there is no split of authority among the circuits regarding any issue *relevant* to the application of the *Parratt-Hudson* doctrine to this case. Moreover, Massachusetts G.L. c. 35, § 51 provides an adequate post-termination remedy.

1. The circuit court's application of *Parratt-Hudson* in this case is consistent with this Court's precedent.

1.1 This Court's decisions in *Parratt*, *Logan*, *Hudson*, *Loudermill* and *Zinermon*.

Procedural due process *usually* requires that a public employee, dismissible only for cause, be given some kind of pre-termination hearing. *Gilbert* v. *Homar*, 520 U.S. 924, 929

(1997); *Loudermill*, 470 U.S. at 542. There is no disagreement on this point. Although respondents maintain that Hadfield was an at will employee of Sheriff McDonough under Massachusetts G.L. c. 126, § 8A and had no property interest in continuing his employment as ADS-Training, they acknowledge that if Hadfield were subject instead to Massachusetts G.L. c. 35, § 51, Sheriff McDonough violated that statute by terminating him without a prior hearing.

This Court has recognized that while substantive due process violations occur at the time of the deprivation, procedural due process violations are not complete at the time of the deprivation, but only when the state fails to provide due process (because it is the lack of appropriate process, not the deprivation which is unconstitutional). *Zinermon*, 494 U.S. at 125-26. The critical inquiry is what process the state provided and whether it was adequate. *Id.*

In determining what process is due, a court must weigh several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. . . .

Zinermon, 494 U.S. at 127, quoting *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In *Loudermill*, the Court applied this balancing test to a claim that a school district violated its employees' procedural due process rights when it terminated their employment without a prior hearing. Although the terminated employees had a statutory right to appeal the termination, the statute made no provision for a pre-termination hearing. Concluding that due process normally requires at least a minimal

pre-deprivation hearing, this Court held that the terminated employees had stated a due process claim.

Like *Loudermill*, this Court's decisions in *Parratt*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Hudson* and *Zinermon* all apply the factors outlined in *Matthews* to determine what procedural protections are constitutionally required. In *Zinermon*, this Court stated:

> . . . *Parratt* is not an exception to the *Matthews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Matthews* equation – the value of predeprivation safeguards – is negligible in preventing the kind of deprivation at issue.

Id. at 128-29.

Under the *Parratt-Hudson* doctrine, when circumstances are such that is impossible or impractical for the state to provide pre-deprivation process, then no such process is required, and due process is satisfied if the state provides an adequate post-deprivation remedy. The *Parratt-Hudson* doctrine embodies important concepts of federalism and protects the federal courts from being swamped with lawsuits better resolved in state courts.[14]

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[14] "The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach 'would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983 . . . [].' . . . The *Parratt* principle respects the delicate balance between state and federal courts. . . ." *Albright* v. *Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring), quoting *Parratt*, 451 U.S. at 531-532.

In *Parratt*, a state prisoner brought a § 1983 action because prison employees negligently had lost materials he had ordered by mail. While recognizing that a predeprivation hearing usually is required, this Court stressed the special situation in *Parratt*, noting that the loss was not due to "some established state procedure and the state cannot predict precisely when the loss will occur. It is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." 451 U.S. at 541. In *Parratt* the Court pointed out that the deprivation in that case,

> occurred as a *result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate* nor is there any contention that is was practicable for the State to provide a predeprivation hearing.

Id. at 543. (Emphasis added.)

In *Logan*, an employee filed a claim with the Illinois Fair Employment Practices Commission but the Commission, through inadvertence, failed to commence a fact finding conference within 120 days as required by statute and thereby lost jurisdiction to hear the case. The employee claimed that the state's established procedure, which divested the Commission of jurisdiction to hear the claim, violated his procedural due process rights. This Court agreed, holding that *Parratt* did not apply because the employee was challenging not the random and unauthorized conduct of a state employee but the established state procedure itself.

In *Hudson*, the Court extended the reasoning of *Parratt* to intentional deprivations of property, explaining that "[t]he state can no more anticipate the random and

unauthorized intentional conduct of its employees than it can similar negligent conduct." 468 U.S. at 533.

Zinermon, on which Hadfield relies, is fully consistent with *Parratt*, *Logan* and *Hudson*, but involved circumstances that rendered the *Parratt-Hudson* doctrine inapplicable. In *Zinermon*, Burch had been admitted to a psychiatric institution as a "voluntary" patient but alleged that hospital staff had failed to obtain his informed consent and therefore, wrongfully had deprived him of his liberty. The defendants claimed that the *Parratt-Hudson* doctrine applied, but this Court disagreed, stressing the distinction made in prior cases between losses caused by random and unauthorized conduct (to which *Parratt-Hudson* applied) and losses resulting from established state procedure (for which a § 1983 claim could be brought). 494 U.S. at 130. Applying that distinction, the Court concluded that the loss suffered by Burch resulted because Florida's statutes delegated broad power to hospital staff to admit psychiatric patients (depriving them of their liberty), but failed to circumscribe that power by requiring that a member of the staff determine whether the prospective voluntary admittee was mentally fit to give informed consent to a voluntary admission:

> The Florida statutes, of course, do not allow incompetent persons to be admitted as "voluntary" patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. . . .
>
> Florida chose to delegate to petitioners a broad power to admit patients to FSH, i.e., to effect what, in the absence of informed consent, is a substantial deprivation of liberty. . . .
>
> * * *

> *Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.*

Id. at 135. (Emphasis added.)

The Court in *Zinermon* distinguished *Parratt* and *Hudson* in three ways. First, due to the special nature of mental illness, it was foreseeable that under Florida's statutory scheme, which did not require a procedure to determine the competency of a patient before their voluntary admission, a patient seeking treatment for mental illness might not be competent and might be admitted despite a lack of informed consent. Moreover, the state could predict precisely when that deprivation of liberty would occur. In contrast, the Court noted that while the state in *Parratt* and *Hudson* might anticipate that on occasion a prison employee negligently or intentionally would lose or destroy an inmate's property, the state could not predict when those deprivations would occur. *Id.* at 136.

Second, the Court in *Zinermon* concluded that, unlike in *Parratt* and *Hudson*, pre-deprivation process was possible and would have been of value in avoiding the deprivation complained of. The Court noted that *Zinermon* was not a case like *Hudson* in which the employee was "bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards." *Id.* at 137. Had the state in *Zinermon* established procedures for obtaining informed consent, there was no reason to believe that the staff would not have followed those rules.

Finally, in *Zinermon*, the Court said that the conduct of the hospital staff in that case was not "unauthorized" within the meaning of *Parratt* and *Hudson*. Instead, the Court noted that the hospital staff had been delegated

broad discretionary authority that had not been delegated to the prison employees in *Parratt* or *Hudson*. The deprivation in *Zinermon*, the Court said, was "'unauthorized' only in the sense that it was not an act sanctioned by state law." *Id.* at 137-38.

1.2 The circuit court's reliance on the *Parratt-Hudson* doctrine was correct.

In the present case, the circuit court properly applied the *Parratt-Hudson* doctrine to bar Hadfield's § 1983 procedural due process claim and in doing so was consistent with this Court's prior rulings.

Loudermill did not displace or limit application of the *Parratt-Hudson* doctrine in appropriate cases and is not controlling in the present case. *Loudermill* merely stated a general rule based on the *Matthews* balancing test and recognized the need for the state to provide pre-deprivation process because it was practicable and would have had significant value in preventing the deprivation. The *Parratt-Hudson* doctrine also is based upon a *Matthews* balancing test, only it applies to situations where, because the state actor's conduct is random and unauthorized and thus unforeseeable, predeprivation process is impracticable and would have no value in preventing the deprivation.

All of the cases discussed above recognize the distinction between losses caused by established state procedures and losses resulting from random and unauthorized conduct in violation of established rules. In *Logan* and *Zinermon*, the *Parratt-Hudson* doctrine did not apply because the losses resulted from flaws in the procedures while in *Parratt* and *Hudson* the claims were that employees had acted in violation of rules that, if followed, would have been sufficient. The present case strongly resembles *Hudson* in that Hadfield

alleges that Sheriff McDonough, for purposes of political retribution, intentionally disregarded the pre-termination hearing required by Massachusetts G.L. c. 35, § 51, which Hadfield claims governed his employment status. According to Hadfield, the deprivation resulted not from any flaw in the state's established pre-termination procedures, but from Sheriff McDonough's violation of them.

Loudermill properly is distinguishable from the present case, as are *Logan* and *Zinermon*, because the claimed deprivations resulted from a flaw in established state procedures, not from a violation of them. In *Loudermill*, the state procedures made no provision at all for predeprivation process. Massachusetts G.L. c. 35, § 51 requires a pre-termination hearing, the very protection to which Hadfield claims to be entitled.

Nor does *Zinermon* render *Parratt-Hudson* inapplicable to Hadfield's claim. The deprivation in *Zinermon* resulted from a flaw in state procedure and the Court assumed that had the procedures been adequate, the hospital officials would have followed them and the deprivation would not have occurred. In the present case, Hadfield alleges that Sheriff McDonough was bent upon political retribution and intentionally violated predeprivation procedures which themselves were adequate.

In addition, none of the three factors relied upon by the Court in *Zinermon* to distinguish *Parratt* and *Hudson* exist in the present case. First, unlike the deprivation in *Zinermon*, the conduct at issue in this case was *not* predictable and could not have been foreseen by the state. In *Zinermon*, it was foreseeable under Florida's statutory scheme, which did not require determination of competency before voluntary admissions, that a patient seeking treatment for mental illness might not be competent yet might still be

admitted despite a lack of informed consent. In the present case, the Commonwealth of Massachusetts had no reason to expect that Sheriff McDonough would violate a state law that required a pre-deprivation hearing; nor could it predict when such a deprivation would occur. In that respect, this case is on all fours with *Hudson*.

Indeed, a state employee's acts must be considered random and unauthorized when they effect a deprivation by violating, rather than conforming to, established, non-discretionary procedures designed to protect an individual's constitutional rights.[16]

The second *Zinermon* factor, that pre-deprivation process was possible and would have been of value in avoiding the deprivation, also is absent in the present case. Pre-deprivation process was not possible precisely because the alleged conduct of Sheriff McDonough was unforeseeable and in violation of established procedures. As this Court made clear in *Hudson*, and again in *Zinermon*, the mere fact that the particular employee whose intentional conduct causes the deprivation can foresee his or her own conduct is immaterial. It is the state that must be in a position to foresee the deprivation. *Hudson*, 468 U.S. at 533-34; *Zinermon*, 494 U.S. at 137.

More fundamentally, because Hadfield alleges that Sheriff McDonough deprived him of pre-deprivation

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[16] *Abdullah* v. *Kennet*, 104 Fed. Appx. 750, 2004 WL 1575064, *1 (1st Cir. July 15, 2004) (unpublished opinion; *Mard* v. *Town of Amherst*, 350 F.3d 184, 193-94 (1st Cir. 2003); *Veterans Legal Defense Fund* v. *Schwartz*, 330 F.3d 937, 940 (7th Cir. 2003); *O'Neill* v. *Baker*, 210 F.3d 41, 49-50 (1st Cir. 2000); *Johnson* v. *Louisiana Dept. of Agriculture*, 18 F.3d 318, 322 (5th Cir. 1994); *Lowe*, 959 F.2d at 343; *Easter House* v. *Felder*, 910 F.2d 1387 (7th Cir. 1990) (*en banc*); *Katz* v. *Klehammer*, 902 F.2d 204, 206-07 (2d Cir. 1990); *Weimer* v. *Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989).

process in violation of state law intentionally and in order to exact political retribution, this case is like *Hudson* in which the prison employee was pursuing a personal vendetta against the inmate whose property he destroyed. In such circumstances, no additional state procedural safeguards could have prevented the deprivation. The present case is very different from *Zinermon*, where this Court assumed that, had the state required appropriate procedures, they would have been followed by the hospital staff and prevented the deprivation. The *Matthews* balance favors application of the *Parratt-Hudson* doctrine in this case because additional or improved procedures would have been of no value, if, as alleged by Hadfield, Sheriff McDonough intentionally violated the existing procedures.

Finally, Sheriff McDonough's alleged conduct in this case was "unauthorized" as that term is used in *Parratt*, *Hudson* and *Zinermon*. In *Zinermon*, the state "broadly delegated, uncircumscribed power" to the hospital staff to admit psychiatric patients, thereby depriving them of their liberty, but it had provided no requirement that a prospective voluntary admittee be evaluated for competency to give informed consent to admission, and did not specify any procedure by which that was to be done. Thus, the state delegated to the hospital staff the state's duty to provide procedures to prevent the very type of deprivation that ultimately occurred. The Court held in *Zinermon* that the state could not use *Parratt-Hudson* to avoid liability if, under those circumstances, the staff failed to properly exercise their broad delegated authority.

The present case bears no resemblance to *Zinermon*. Here, Sheriff McDonough was delegated *no* authority or discretion whatsoever as to when or whether to afford employees entitled to the protection of G.L. c. 35, § 51 a

pre-termination hearing. State law required a pre-termination hearing and left nothing to Sheriff McDonough's discretion.

Relying on the statement in *Zinermon* that the deprivation in *Zinermon* was "'unauthorized' only in the sense that it was not an act sanctioned by state law," 494 U.S. at 137-38, Hadfield argues that Sheriff McDonough's conduct was not "unauthorized" simply because it violated mandatory, non-discretionary state procedures. However, Hadfield ignores a crucial difference between *Zinermon* and the present case. In *Zinermon*, the conduct was "unauthorized" only because it had not been affirmatively sanctioned under state law. The state's procedures were inadequate precisely because they failed to require evaluation for informed consent and left the issue entirely to the discretion of the hospital staff. In contrast, the alleged conduct of Sheriff McDonough in the present case was *prohibited* by state law. While conduct not explicitly permitted may not be "unauthorized" for purposes of *Parratt-Hudson*, as interpreted in *Zinermon*, conduct in violation of mandatory state law clearly is unauthorized.

The circuit court, therefore, properly relied upon the *Parratt-Hudson* doctrine in dismissing Hadfield's procedural due process claim.

2. There is no split among the circuits regarding any issue relevant to the application of the *Parratt-Hudson* doctrine to this case.

Hadfield claims that there is a split of authority among the circuit courts as to "the breadth of the *Parratt-Hudson* doctrine in general and its application to denial of pre-deprivation hearings in the employment context in particular." Petition at 6. Specifically, he claims that the

circuits disagree as to whether the termination of a tenured government employee without an adequate pre-termination hearing gives rise to a § 1983 procedural due process claim where the official responsible for the termination violated established procedure and state law provides an adequate post-deprivation remedy. Hadfield asserts that while the First and Seventh Circuits apply *Parratt-Hudson* to bar due process claims in such cases, the Second, Fourth, Fifth and Ninth Circuits have decided that *Parratt-Hudson* does not apply.

As set forth in the following four subsections, there is no split of authority on this issue. In arguing that the circuits are diverging, Hadfield misapplies the law and fails to refer the Court to recent decisions in each of the circuits involved that undermine his contention.

At the outset, there is no justification for Hadfield's apparent position that due process claims arising from employment decision are *sui generis*, at least in determining whether conduct is random and unauthorized. Whether conduct is random and unauthorized depends on the relationship between the conduct and the applicable state law and on the extent of discretion, if any, delegated by the state to the actor. The same analysis applies to employment related conduct as to any other procedural due process case.

2.1 The Fifth Circuit.

Hadfield cites a single Fifth Circuit case, *Findeisen* v. *North East Independent School District*, 749 F.2d 234 (5th Cir. 1984), decided more than 20 years ago, while he ignores multiple Fifth Circuit cases since that time that show clearly that the Fifth Circuit agrees with the First, Seventh and other circuit courts that conduct by an official

in violation of established state procedures is random and unauthorized, thus triggering application of *Parratt-Hudson* if an adequate post deprivation remedy exists. For example, in *Johnson* v. *Louisiana Dept. of Agriculture*, 18 F.3d 318 (5th Cir. 1994), decided ten years after *Findeisen*, the Fifth Circuit stated:

> § 1983 should not be employed to remedy deprivations which occur at the hands of even high ranking state employees "*who [are] acting in direct contravention of the state's established policies and procedures which have been designed to guarantee the very protections which the employee now has chosen to ignore.*" . . . Simply because Odom is a high state official does not mean that his actions are automatically considered established state procedure that would take the case outside of the *Parratt/Hudson* doctrine.

Id. at 322. (Emphasis added.)[18]

In sum, the Fifth Circuit applies the same law as the First Circuit did in the present case.

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[18] In *Charbonnet* v. *Lee*, 951 F.2d 638 (5th Cir. 1992), the court held that the conduct of a police officer in failing to remain neutral in a civil dispute, in violation of applicable police regulations, was random and unauthorized, stressing that "any harm to the plaintiff came not from a lack of foreseeably necessary safeguards but from a violation of controlling state regulations." *Id.* at 643. The court noted further that, "if the official is found to have violated [established state] procedure (and there is an adequate remedy under state law), then he is usually protected in his individual capacity by the *Parratt-Hudson* doctrine." *Id.* at 645. *See also Meyers* v. *Klevenhagen*, 97 F.3d 91, 95 (5th Cir. 1996); *Cathey* v. *Guenther*, 47 F.3d 162, 164 (5th Cir. 1995); and *Caine* v. *Hardy*, 943 F.2d 1406, 1413-14 (5th Cir. 1991) (distinguishing *Zinermon* on basis that while the conduct in *Zinermon* was an abuse of judgment, the exercise of that judgment was condoned by state regulations while in *Caine*, the conduct at issue, was an "intentional violation[] of controlling state regulations").

2.2 The Second Circuit.

Hadfield contends that there is split of authority between the First and Second Circuits regarding application of *Parratt-Hudson*, citing *Dwyer* v. *Regan*, 777 F.2d 825 (1985) to support his argument. *Dwyer* recognizes a special exception to the *Parratt-Hudson* doctrine and holds that conduct that otherwise could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a "high-ranking official having final authority over the decision-making process." *Id.* at 832. Notably, the Second Circuit continues to apply *Parratt-Hudson* where the exception set forth in *Dwyer* is not applicable.[17]

However, Sheriff McDonough is not a high-ranking official within the meaning of *Dwyer*. Courts in the Second Circuit equate a high-ranking official for *Parratt-Hudson* purposes with a final policymaker under *Monell* v. *Dept. of Social Services*, 436 U.S. 658 (1978).[18] Sheriff McDonough

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[17] In *Hellenic American Neighborhood Action Committee* v. *City of New York*, 101 F.3d 877 (1996), a case *decided 12 years after Dwyer*, the Second Circuit applied *Parratt-Hudson* to a city contractor's claim that its due process rights had been violated when a city official "de facto" barred it from city procurements, stressing that the contractor, "makes no claim that the due process violation was caused by an established state procedure. . . . To the contrary, [the contractor] argues that state officials acted in flagrant violation of the City Charter and the PPB rules." *Id.* at 881. *See also Katz* v. *Klehammer*, 902 F.2d 204, 206-07 (2d Cir. 1990) (applying *Parratt-Hudson* because conduct complained of was violation of state law rather than pursuant to established procedures).

[18] *Smith* v. *City of New York*, 2005 WL 1026551, *8 (S.D.N.Y. May 3, 2005); *Verri* v. *Nanna*, 972 F.Supp. 773, 793-94 (S.D.N.Y. 1997) (citing *Sullivan* v. *Town of Salem*, 805 F.2d 81, 86 (2d Cir. 1986) for the proposition that "question of policymaker status for the purposes of municipal liability under § 1983 is helpful for the purpose of 'random and unauthorized' inquiry under due process analysis"); *Krmencik* v. *Town of Plattekill*, 1989 WL 114307, *4 (N.D.N.Y. August 25, 1989).

is not a final policymaker for municipal liability purposes with respect to employment-personnel decisions within the meaning of *Monell*. His hiring and firing decisions are constrained by state law such as Massachusetts G.L. c. 35, § 51 and county policies not of his own making. Moreover, under that statute, his decisions are subject to review and reversal by the respondent commissioners.[19] Even if Sheriff McDonough exercised discretion as to hiring and firing, and even if he had abused that discretion, he did not make county policy with regard to employment matters. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988).

The status of a county sheriff was specifically discussed by this Court in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986):

> Thus, for example, *the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy*. . . . Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. *This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.*

[19] There is no evidence in the record that the respondent commissioners participated in Sheriff McDonough's termination of Hadfield's employment without a pre-termination hearing. The commissioners determined only that they were without jurisdiction to hear Hadfield's claim on the grounds that Massachusetts G.L. c. 35, § 51 did not apply and that Hadfield was an at will employee of the Sheriff under G.L. c. 126, § 8A. *See* note 9, *supra*.

Id. at 483 n. 12. (Emphasis added.) Indeed, in *Jeffes* v. *Barnes*, 208 F.3d 49, 60-61 (2d Cir. 2000), the Court of Appeals for the Second Circuit, while holding that a sheriff was a policymaker on other issues, made clear that a sheriff is *not* a policymaker on employment-personnel matters.[20]

Sheriff McDonough, when engaged in employment-personnel matters, as in the present case, is not a "high-ranking official" for purposes of the Second Circuit's special exception to *Parratt-Hudson*. Since the Second Circuit's high-ranking official exception does not apply to the present case, and the Second Circuit otherwise applies *Parratt-Hudson* in the same manner as the First Circuit when a violation of state law is involved, there is no split of authority between the Second and First Circuits.

2.3 The Ninth Circuit.

Citing to the Ninth Circuit's decision in *Honey* v. *Distelrath*, 195 F.3d 531 (9th Cir. 1999), Hadfield claims a split in authority between the Ninth and First Circuits. However, *Honey* does not support Hadfield's claim that a split of authority exists, as the Ninth Circuit also agrees with the First Circuit that conduct in violation of state law or established procedures is random and unauthorized for purposes of *Parratt-Hudson*. Hadfield cites *Honey*, and only *Honey*, for the proposition that in the Ninth Circuit, "even acts in violation of established law may not be considered 'authorized'." *Id.* at 534. However, Hadfield both ignores more recent Ninth Circuit case law indicating

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[20] *See also Looby* v. *City of Hartford*, 152 F.Supp.2d 181, 188-89 (D. Conn. 2001) (holding that fire chief was not final policymaker as to personnel issues).

that a violation of established law is "random and unauthorized," and misinterprets the meaning of *Honey* itself.

According to the Ninth Circuit in *Corcoran* v. *Olson*, 102 Fed. Appx. 522, 523-24 (9th Cir. 2004) (unpublished),

> *A state official's failure to abide by constitutionally adequate procedures does not, under the circumstances of this case, give rise to a cause of action under §1983 for violation of procedural due process if a meaningful post-deprivation remedy is available.*
>
> Since Corcoran does not argue that the state's procedures are themselves inadequate, Corcoran's remedy is to seek relief under state law. . . .

(Emphasis added.) In like manner, the Ninth Circuit Court said in *Sorrels* v. *McKee*, 290 F.3d 965, 972 (2002):

> It was not the prison's rejection of the publication that makes out a procedural due process claim; it is the *lack of notice* of that rejection under *Procunier*. *Only if the failure to provide notice was pursuant to prison policy does this constitute a due process violation* actionable under § 1983. There is no evidence that this failure was anything other than a random mistake. Defendants maintain that the lack of notice was "a rare and inadvertent action," and Sorrels admits that he *does not "allege or present any evidence that there is a widespread refusal or a custom or practice* not to issue mail rejections."

(Emphasis added.)[21] Thus, there is no question, based on its decisions before and after *Honey* that the Ninth Circuit

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[21] *See also Williams* v. *Norton*, 185 F.3d 872, 1999 WL 386955, *1 (9th Cir. March 11, 1999) (unpublished); *Hodgson* v. *Waters*, 958 F.2d 377, 1992 WL 55856, *2 (9th Cir. March 23, 1992) (unpublished); *Burson* v. *State of Nevada Dept. of Human Resources*, 42 F.3d 1398,

(Continued on following page)

applies the same *Parratt-Hudson* rules as do the First and other circuits.

Nor does the Ninth Circuit's decision in *Honey* support Hadfield's claim that a split of authority exists. The *Honey* Court declined to apply *Parratt-Hudson* because the conduct complained of was alleged to be "in accordance with the policies, practices and customs of" the defendant police department and ci[illegible]and to have formed a pattern, all of which the court regarded as evidence that the acts were "deliberate, considered, [and] planned" so as to fall outside the application of *Parratt*. 195 F.3d at 534. Although the *Honey* court did say that "even acts in violation of established law may be considered 'authorized'," it meant only that when conduct is in accordance with *de facto* policies, practices or customs, it is not random or unauthorized even if those policies, practices or customs are contrary to state law.[22]

1994 WL 681051, *2 (Dec. 6, 1994) (unpublished); *Raditch* v. *United States*, 929 F.2d 478, 480 (9th Cir. 1991) ("intentional deprivation of a property right by a government official, in violation of established procedure, is a random and unauthorized act that cannot be prevented by predeprivation process").

[22] As support for its decision, the *Honey* court cited other cases in which the conduct at issue was pursuant to policy or custom even if contrary to law: *Piatt* v. *MacDougall*, 773 F.2d 1032, 1034, 1036 (9th Cir. 1985) (conduct of prison officials in denying prisoner payment for work performed was not random and unauthorized because it was part of a "consistent policy" toward all inmates and was "routine"); *Haygood* v. *Younger*, 769 F.2d 1350, 1358 (9th Cir. 1985) (conduct of state officials in wrongfully extending prisoner's confinement was not random and unauthorized, even though illegal, because it was done "through established interpretations of the regulations" and was "de facto government policy"); *Armendariz* v. *Penman*, 31 F.3d 860, 863 (9th Cir. 1994) (conduct complained of was in accordance with city policy to engage in a series of "sweeps" to close down low income housing units and expel gang members from the city).

Neither *Honey* nor the cases it cites bear any resemblance to the present case. There is no evidence in the record in the present case that there had been an established formal or informal state, county or PCSD procedure, policy or custom of denying a pre-termination hearing to a PCSD employee entitled to the protection of Massachusetts G.L. c. 35, § 51. In the present case, Sheriff McDonough is not alleged to have acted pursuant to any established procedure or *de facto* policy, but in a single incident as an act of political retribution.

As the forgoing analysis indicates, the Ninth Circuit would find that the conduct complained of in this case is random and unauthorized, consistent with the First Circuit's decision in this case.

2.4 The Fourth Circuit.

Hadfield cites *Plumer* v. *State of Maryland*, 915 F.2d 927 (1990), and *Fields* v. *Durham*, 909 F.2d 94 (1990), in support of his claim that the Fourth Circuit is in conflict with the First Circuit on the application of *Parratt-Hudson*. Hadfield contends that in the Fourth Circuit an official's conduct in violation of established state law is not "random and unauthorized" for purposes of the *Parratt-Hudson* analysis. However, Hadfield fails to refer this Court to *Bogart* v. *Chapell*, 396 F.3d 548 (2005), the most recent decision of the Fourth Circuit on this issue, and one in which that court makes absolutely clear that it regards conduct in violation of established state law as random and unauthorized.

In *Bogart*, an animal owner of numerous dogs and cats, brought a § 1983 action against the county and certain of its officials and employees who, after receiving complaints about maltreatment of the animals and arresting her, had seized the animals and immediately euthanized almost all

of them, in violation of a South Carolina statute which required officials who seize animals to care for them pending the outcome of civil or criminal court proceedings. *Id.* at 554 n. 3. The district court dismissed Bogart's procedural due process claim, ruling that the conduct of the officers responsible for euthanizing the animals was random and unauthorized because it violated nondiscretionary procedures set forth in the South Carolina statute.

After recognizing *Plumer* and *Fields*, the Fourth Circuit affirmed. The court rejected Bogart's assertion that her due process claim was saved by *Zinermon*, noting that, unlike the broad delegation of authority to the hospital staff in *Zinermon*,

> [t]he South Carolina code prescribed precisely how the Defendants were to act once they seized Bogart's dogs and cats. . . .

Id. at 561. Therefore, because the defendants "lacked authority to destroy the animals immediately upon their seizure . . . the state could not predict this deprivation." *Id.*

While in *Zinermon*, if the state had provided more guidance and delegated less discretion to the hospital staff, the deprivation might have been avoided, the *Bogart* court said that in the case before it the state had given the defendant officers no discretion. The court likened the case before it to *Hudson* where the deprivation was intentional and no amount of predeprivation process would have avoided the deprivation. *Id.* at 562.

If, as Hadfield claims, the decisions in *Plumer* and *Fields* stand for a rule in the Fourth Circuit that conduct in violation of established state procedures is not random and

unauthorized, a debatable proposition in the first place,[23] *Bogart*, decided 15 years later, clearly rejects that rule and brings the Fourth Circuit in line with the First Circuit and the others. Nothing makes this more clear than the language of the dissent in *Bogart* (Williams, J.), who identified two possible approaches to "random and unauthorized" under *Parratt-Hudson*: the "legalist" approach under which conduct is deemed random and unauthorized, precluding § 1983 liability, if such conduct violates state law, and the "governmental" approach under which even conduct in violation of state law can give rise to government liability. *Id.* at 564. According to Judge Williams, *Plumer* and *Fields* adopted the governmental approach but the *Bogart* majority abandoned that approach in favor of the legalist approach under which conduct in violation of state law is deemed random and unauthorized. *Id.* at 566.

Thus, *Bogart* establishes that, under Fourth Circuit law, conduct in violation of established state procedures is deemed to be random and unauthorized; and proves that there is no conflict between the First Circuit and the Ninth on the application of the *Parratt-Hudson* doctrine to the facts of this case.

As the foregoing analysis establishes, there is no split of authority among the circuits regarding any issue relevant to the application of the *Parratt-Hudson* doctrine to this case.

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[23] Both the *Plumer* and *Fields* courts ruled that the plaintiffs' § 1983 procedural due process claims failed because adequate predeprivation process had in fact been given. Thus, those courts did not need to apply *Parratt-Hudson* and any other views expressed in those cases are *dicta*.

3. Massachusetts G.L. c. 35, § 51 provides an adequate post-deprivation remedy.

The Commonwealth of Massachusetts provided Hadfield an adequate post-deprivation remedy through Massachusetts G.L. c. 35, § 51 and judicial review by the Massachusetts courts. The Massachusetts Appeals Court held in *Puorro* v. *Comm.*, 59 Mass. App. Ct. 61, 794 N.E.2d 624 (2003), that an employee denied the pre-termination process required by § 51 has a right to use the appeal procedures set forth in § 51 to challenge the denial. The fact that Hadfield chose not to pursue this remedy is immaterial.

In his Petition, Hadfield claims that his post-deprivation remedy under § 51 is inadequate because he would "face the prospect of months or years of litigation to secure a post-termination remedy in state court," citing Bureau of Labor Statistics data, Petition at p. 28, which he claims indicates that the average employment litigation in a "sample of state courts" lasts 20.2 months. There is no merit to this claim.

First, recently enacted time standards for the Massachusetts state District Court, which would hear Hadfield's appeal under G.L. c. 35, § 51, require that court to render a decision within four months of filing, certainly not a long delay. District Court Standing Order 2-04, Part II and appendix.[24] The enactment of these standards is a clear indication that the Massachusetts state court system is capable of hearing such claims promptly.

Although this Court has recognized that "at some point, a delay in the post-termination hearing would

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[24] Resp. App. 8.

become a constitutional violation," *Loudermill*, 470 U.S. at 547, normal delays associated with litigation in the court system are not the kind of delay which renders a post-deprivation remedy inadequate. In fact, the *Loudermill* Court held that a nine month delay in providing a hearing did not work a denial of due process, while other federal courts have held that delays of two years did not violate due process.[25]

In *Easter House* v. *Felder*, 910 F.2d at 1406, the Court of Appeals for the Seventh Circuit, noting that "almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process," stated:

> [W]e . . . reject [the] characterization of the state recovery process as a "lengthy and speculative process" which forecloses the application of *Parratt*. In *Hudson*, the Supreme Court rejected an argument that state law relief should be deemed inadequate because it "is far from certain and complete." 468 U.S. at 535, 104 S.Ct. at 3205. . . .
>
> * * *
>
> [W]e should not reject the application of *Parratt* unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can

[25] *Matthews* v. *Eldridge*, 424 U.S. 319, 342 (1976) (11 month delay); *Isaacs* v. *Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (19 months; *Ritter* v. *Cohen*, 797 F.2d 119, 124 (3d Cir. 1986) (20 months); *Givens* v. *United States Railroad Retirement Bd.*, 720 F.2d 196, 201 (D.C. Cir. 1983) (19 months); *Frock* v. *United States Railroad Retirement Bd.*, 685 F.2d 1041, 1047 (7th Cir. 1982) (two years).

be said to provide the due process relief guaranteed by the Fourteenth Amendment.[28]

In any event, if the *Parratt-Hudson* doctrine did not bar his procedural due process claim, Hadfield would be left with pursuing his § 1983 in the federal courts, which, as noted in *Easter House*, is a lengthy process in itself.

CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully submitted,

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[28] *See also Hartwick* v. *Board of Trustees of Johnson County Community College*, 782 F.Supp. 1507, 1515 (D. Kan. 1992).

APPENDIX

Amendment 14 to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or

rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Massachusetts G.L. c. 35, § 51

The board shall (*a*) pass upon and finally adopt and put into effect, with such modifications, changes and additions as it shall deem proper, the classification and compensation plans and rules for their administration proposed by the director of accounts under section fifty; (*b*) pass upon, finally adopt and put into effect, with such modifications as it may deem proper, amendments to the classification and compensation plans and the rules for their administration as may be proposed from time to time under the provisions of section fifty or fifty-three; provided, that no such amendment not proposed by the director of accounts under section fifty shall be adopted except after a report which shall be made by said director within thirty days after submission to him; and provided, further, that an amendment proposed under section fifty-three and adopted by the board shall be effective only in the county whose county commissioners have proposed the amendment unless the county commissioners of four or more counties have joined in the proposal in which case it shall be effective in all counties, other than Suffolk and such other counties, if any, as shall under section fifty-six have ceased to be represented in the board; (*c*) pass upon and finally determine appeals relative to classification, as provided in section fifty-two; and (*d*) perform such other functions and duties as may be imposed upon it by sections forty-eight to fifty-five, inclusive.

The board is hereby authorized and directed to establish and administer uniform rules and regulations governing leaves of absence, shift differentials and overtime for officers and employees subject to section forty-eight to fifty-six, inclusive.

Any employee subject to sections forty-eight to fifty-six, inclusive, except superintendent and assistant

superintendent of hospital, the chief of medical staff and the administrator at the Barnstable county hospital, superintendent and assistant superintendent of training school, superintendent and assistant superintendent of buildings, superintendent of industrial farm, superintendent of state reservation, director of agricultural school, director of extension service, master and keeper and assistant master and keeper of jail and house of correction, assistant registers of deeds, county health officer, county engineer and county dog officer, who has completed at least five years of service may not be discharged from such employment except for just cause and for reasons specifically given him in writing by the appointing authority. Before any such discharge is effected, the employee shall be given a full hearing before the appointing authority, of which hearing he shall have at least three days' written notice, exclusive of Sundays and holidays, from the appointing authority. Within two days, exclusive of Sundays and holidays, after completion of said hearing, the appointing authority shall give the employee affected a written notice of his decision, stating fully and specifically the reasons therefor.

If within five days after receiving written notice of the decision of the appointing authority, the person so discharged shall so request in writing, he shall be given a hearing before the board. Said hearing shall be commenced in not less than three nor more than ten days, and shall be completed within thirty days after the filing of such request. The decision of the board shall be in writing and notice thereof shall be sent to all parties concerned within ten days after completion of the hearing. If the board finds that the action of the appointing authority was justified, such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation.

Within thirty days after action by the board on such a hearing, the person who was discharged may, if said action was affirmed by the board, bring a petition in the district court within the judicial district of which such person resides, addressed to the justice of the court, praying that the action of the appointing authority and of the board in discharging him may be reviewed by the court, and, after such notice to the appointing authority and the board as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such action was justified. If the court finds that such action was justified the action of the appointing authority and of the board shall be affirmed; otherwise they shall be reversed and the petitioner shall be reinstated in his office or position without loss of compensation. The decision of the court shall be final and conclusive upon the parties.

Massachusetts G.L. c. 126, § 8A

The chief administrative officer of a house of correction shall be the superintendent. The superintendent, and any deputy superintendents, shall be appointed by the sheriff, or in the case of Suffolk county, by the penal commissioner of the city of Boston, and shall serve at his pleasure, and shall not be subject to the provisions of sections nine A and nine B of chapter thirty, or chapter thirty-one.

MASSACHUSETTS STANDING ORDERS OF THE DISTRICT COURT

JOINT STANDING ORDER 2-04. TIME STANDARDS FOR CIVIL CASES

I. INTRODUCTION

These time standards are promulgated to provide judges and clerk-magistrates with specific maximum time periods within which civil cases (1) should progress between court events and (2) should be disposed. The purpose of these time standards is to promote timely disposition of civil cases and to provide a basis for assessing the movement of civil cases from commencement to disposition in each division of the two departments in which they apply.

The time standards are divided into three categories, each comprised of specific types of civil actions ("casetypes") and each governed by a specific standard for a maximum time to disposition.

In general, these three time standard categories reflect the complexity (or potential complexity) of the casetypes each includes, with the least complex in Category A, the more complex in Category B, and the most complex (or potentially complex) in Category C.

The casetypes in Category A consist mainly of actions that by law must be disposed well within the two-month maximum. For these cases the time standard will provide a basis for periodically confirming that no cases are unaccounted for or overlooked.

Two casetypes in Category B, summary process and small claims, have "staircased" time standards to reflect the fact that significant numbers of these cases should be

disposed well before their overall maximum time to disposition.

Category C, which consists of tort and contract actions, also has "staircased" time standards to reflect the fact that most of these cases should be disposed well before the overall maximum time limit.

II. THE TIME STANDARDS

CATEGORY A – Time to Disposition: Upon Filing or Not More Than 2 months from commencement

- Domestic Violence Restraining Orders
- Actions for Equitable Relief for Residential Lock-Outs and Utility Shut-Offs
- Mental Health Proceedings
- Applications for Marriage Age and Time Waivers
- Actions to Enforce Sanitary Code

CATEGORY B – Time to Disposition: Not More Than 4 months from commencement

- Summary Process: 50% NMT 1 month; 90% NMT 2 months; 100% NMT 4 months
- Small claims: 75% NMT 2 months; 100% NMT 4 months.*
- Civil Motor Vehicle Infractions*
- Supplementary Process
- Judicial Review of Administrative Decisions**

- Other Specialized District Court and Boston Municipal Court Actions**

* 5 months if de novo appeal is claimed

** See attached list

CATEGORY C – Tort and Contract Actions

C-1 75% of Total Dispositions	Time to Disposition: Not More Than 6 months from commencement • Cases dismissed for plaintiff's failure to make timely service • Cases disposed by default judgment • Cases disposed by voluntary dismissal, agreement for judgment or other consensual disposition
C-2 20% of Total Dispositions	Time to Disposition: Not More Than 12 months from commencement • Cases disposed by bench trial Dispositions • Cases disposed by voluntary dismissal, agreement for judgment or other consensual disposition • Cases dismissed for plaintiff's failure to seek default judgment
C-3 5% of Total Dispositions	Time to Disposition: Not More Than 24 months from commencement • Cases disposed by jury trial • Cases disposed by bench trial after having been scheduled for jury trial

- Cases disposed by voluntary dismissal, agreement for judgment or other consensual disposition after having been scheduled for trial

Maximum Intervals Between Court Events:

- From Answer to Case Management Conference Date: Not More Than 4 Months
- From Case Management Conference to Pretrial Conference Date: Not More Than 7 Months
- From Pretrial Conference to Trial: Not More Than 3 Months

/s/ CHARLES R. JOHNSON
Charles R. Johnson,
Chief Justice Boston Municipal Court Department

/s/ LYNDA M. CONNOLLY
Lynda M. Connolly,
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Promulgated:
Effective:

APPENDIX

Category B – Boston Municipal Court and District Court Actions for Judicial Review of Administrative Agency Decisions

- Abandoned property appeals
- Unemployment compensation appeals
- Motor vehicle insurance property appeals
- Firearms license denied appeals

- County Personnel Board and involuntary retirement appeals
- Zoning appeals
- Dog order appeals
- Arbitration appeals regarding residential repair contracts
- Appeals from Historic District Commission decisions
- Civil service retirement appeals
- Appeals from Funeral Directors' Board of Registration decisions
- Review of decisions of Massachusetts Commission Against Discrimination
- Review of certain Board of Health abatement orders

Category B – Other Boston Municipal Court and District Court Civil Actions

- Actions to enforce certain real estate liens
- Replevin
- Garage and automobile liens
- Repossession
- Actions to assess support against kindred of persons in need
- Actions by jurors against employers who fail to compensate employees who perform jury service
- Actions seeking a decree of forfeiture and sale with regard to property seized by law enforcement personnel because of an offense

- Hearings at the request of a municipal tax collector on a taxpayer's ability to pay a tax
- Applications for waiver of the three-day period prior to issuance of marriage license
- Applications by minors for authorization to marry
- Actions to enforce the state sanitary code
- Actions by the Commissioner of Medical Assistance seeking entry of judgment regarding overpayments made to a provider of medical care under G.L. c. 118E
- Forfeiture proceedings regarding certain explosives and flammable substances
- Proceedings to compel testimony before the State Fire Marshal
- Orders by a District Court to expunge certain entries in the records of the Department of Probation and the Criminal History Systems Board
- Proceedings for violations of certain municipal ordinances or by-laws that are treated as civil infractions
- Actions to enforce discovery in cases pending in other states; and
- Actions regarding condominium conversions

Adopted effective November 1, 2004.

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Supreme Court, U.S.
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No. 05-214

IN THE

Supreme Court of the United States

Russell J. Hadfield,

Petitioner,

v.

Joseph McDonough, in his individual and official capacity as Sheriff of Plymouth County, Massachusetts, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), this Court held that the Due Process Clause requires a pre-termination hearing before a tenured public employee may be deprived of his property interest in his job. Relying on the so-called "*Parratt-Hudson*" doctrine, the First Circuit holds that a pre-termination hearing is *not* actually required, and that a post-deprivation remedy will suffice, so long as the denial of the pre-termination hearing also violates state law. Pet. App. 13a-14a. Respondents agree that this incongruous rule is, in fact, the law of the First and Seventh Circuits. See BIO 15 & n.15. Moreover, respondents do not dispute that decisions from the Second, Fourth, Fifth, and Ninth Circuits have squarely refused to apply that rule when presented with cases in which tenured employees were denied pre-termination hearings in violation of state law. Respondents also do not contest that the question presented is recurring and important. Nor have they identified any vehicle problems that would prevent the Court from resolving the circuit split in this case.

Instead, respondents' principal argument against certiorari is that the decisions petitioner cited as conflicting with the First Circuit rule no longer represent the law of their respective circuits. As discussed below, that assertion is unfounded. Respondents point to no intervening decisions of this Court or the courts of appeals sitting en banc overruling, or even undermining, the on-point decisions cited by petitioner. Rather, respondents rely on cases (some not even precedential) addressing due process challenges in other, inapposite contexts. The difference in outcome in these cases does not, as respondents allege, demonstrate that the circuits have abandoned their prior employment cases. Indeed, the decisions respondents cite do not purport to, and could not, overrule the prior on-point circuit precedent. At the same time, as shown below, there are numerous recent cases outside the employment context in which courts have refused

to hold that conduct which violated state law was therefore "random and unauthorized" under *Parratt-Hudson*. Thus, at most, respondents' cases illustrate petitioner's point (Pet. 14-15) that there is a broad confusion in the circuits about the proper scope and application of *Parratt-Hudson*. That is a reason to grant the petition, not a reason to deny it.

1. Respondents have done nothing to undermine petitioner's demonstration (Pet. 9-15) of the deep and entrenched circuit split over whether the failure to provide a pre-termination hearing violates the Due Process Clause when the hearing was also required by state law and state law provides a post-termination remedy

a. Fourth Circuit. Respondents do not dispute that the decision below is in direct conflict with *Fields* v. *Durham*, 909 F.2d 94 (CA4 1990). Relying on settled circuit precedent, the First Circuit held below that "a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law." Pet. App. 13a (citations omitted). The Fourth Circuit reached the same conclusion in the initial appeal in *Fields*. See 909 F.2d at 96. However, when ordered by this Court to reconsider its decision in light of *Zinermon* v. *Burch*, 494 U.S. 113 (1990), the Fourth Circuit reversed course and concluded that the denial of a pre-termination hearing violates the Due Process Clause even if the denial also violates state law. 909 F.2d at 96-98. *Zinermon*, the Fourth Circuit concluded, reaffirmed that *Loudermill*, not *Parratt-Hudson*, established "the proper standard by which to judge the adequacy of the process afforded." *Id.* at 97 (citation omitted).

Respondents do not dispute that petitioner's due process claim would succeed under *Fields*, but rather argue that the Fourth Circuit abrogated *Fields* in *Bogart* v. *Chapell*, 396 F.3d 548 (2005). See BIO 25-27. This argument fails. In *Bogart*, the police seized more than two hundred of the plaintiff's cats and dogs. Although they were required to care

for the animals under state law, the police instead had the animals euthanized. The court held the subsequent due process claim barred by *Parratt-Hudson*. Respondents argue that in so doing, the court necessarily overruled *Fields*, pointing to the *Bogart* dissent. BIO 27. Respondents conspicuously omit, however, that the *Bogart majority* specifically distinguished *Fields*, explaining that while the officers in the case before it were entirely without authority to destroy the animals, in "*Fields*, the state actors (like those in *Zinermon*) were empowered by the State with the authority to effect the deprivations at issue [*i.e.*, the job termination] and the duty to provide the plaintiffs with predeprivation procedural safeguards." *Bogart*, 396 F.3d at 560 n.11. Petitioner's case, of course, would be controlled by the rule of *Fields*, not *Bogart*, as the *Fields* decision directly addresses the question presented here. But even under *Bogart*, the *Parratt-Hudson* doctrine would not apply because respondent McDonough had the power to fire petitioner and the duty to provide him with a pre-termination hearing. See *ibid.*

b. Fifth Circuit. Respondents make the same mistake in attempting to show that there is no division between the First and Fifth Circuits. Again, respondents do not contest that the decision below cannot be reconciled with *Findeisen* v. *North East Independent School District*, 749 F.2d 234 (CA5 1984). Instead, they argue that *Findeisen* was overruled *sub silentio* by a subsequent case having nothing to do with *Loudermill* or employment termination. See BIO 18-19. This time, respondents rely primarily on a case involving the revocation of a crop-dusting license. *See id.* 19 (citing *Johnson* v. *La. Dep't of Agric.*, 18 F.3d 318 (CA5 1994)). But *Johnson* is inapposite to termination questions, and the panel in that case had no authority to overrule *Findeisen*. In fact, *Johnson* did not even cite *Findeisen*, much less purport to overrule it.[1]

---

[1] In any event, the panel in *Johnson* acknowledged that the proper construction of the *Parratt-Hudson* doctrine was not disputed in the case before it, as the plaintiff's only argument in

The same is true of the other cases cited in respondents' brief at footnote 16, none of which concern employment termination or discussed *Findeisen*. The decision in *Caine* v. *Hardy*, 943 F.2d 1406 (CA5 1991) (en banc), for example, did not disturb the court's prior employment termination law. *Caine* arose from the suspension of a doctor's clinical privileges at a hospital. The court's primary holding was that a formal pre-suspension hearing was unnecessary under ordinary due process balancing principles, in light of exigent circumstances (the death of a patient). *Id.* at 1412. The court also rejected the doctor's claim that a pre-suspension hearing was nonetheless required by *Zinermon*. *Id.* at 1413. In so doing, however, the court did not cast doubt on *Findeisen*, noting that *Zinermon* "requires a case-by-case analysis of the deprivation at issue." *Ibid.*

The Court returned to the due process rights of terminated public employees in *Coggin* v. *Longview Independent School District*, 337 F.3d 459 (CA5 2003) (en banc). In that case, a tenured teacher was fired without a pre-termination hearing even though state law clearly required one. *Id.* at 465-66. Rather than adopting respondents' view that the violation of state law made the denial "random and unauthorized," the en banc court held that the school board violated the teacher's due process rights. *Ibid.* The Fifth Circuit cited *Zinermon* for the proposition that under "well-established federal law, the constitutional minimums for due process require that the final decision maker must hear and consider the employee's story *before* deciding whether to discharge the employee." *Id.* at 465 (footnote omitted, emphasis added). While the extent to which the parties addressed the application of *Parratt-Hudson* is unclear, the decision in *Coggin*, and especially the citation to *Zinermon*,

---

support of his due process claim was that "an earlier opinion in this case established a violation of due process" and therefore established "law of the case." 18 F.3d at 321.

would be difficult to explain had the Fifth Circuit overruled *Findeisen* in *Johnson* or *Caine*.

c. Ninth Circuit. Following the same pattern, respondents do not dispute that in *Honey* v. *Distelrath*, 195 F.3d 531, 533-34 (CA9 1999), the Ninth Circuit rejected the claim that the denial of an adequate pre-termination hearing was "random and unauthorized" simply because the denial also violated state law. Instead, respondents argue that *Honey* no longer represents the law of the Ninth Circuit and that even if it did, it would not apply to petitioner's claim in this case. Both assertions are incorrect.

First, in arguing that the law of the circuit has changed since *Honey*, respondents are again unable to point to any case in the relevant context of employment, much less any case purporting to overrule *Honey* or modify its holding. Instead, respondents again rely on inapposite decisions in other contexts by panels that lacked the authority to overrule *Honey*; in fact, many of the decision lack any precedential authority at all. See BIO 23 & n.21 (four out of six cases cited unpublished); 9th Cir. R. 36-3. Respondents cannot plausibly claim that a court deciding petitioner's case in the Ninth Circuit would have disregarded the on-point binding decision in *Honey* in favor of a non-precedential decision arising in a different context.

Respondents also argue that the petition mischaracterizes the holding of *Honey*. The Ninth Circuit, respondents claim, applies the same rule as the First, with a narrow exception created in *Honey* for denials of due process that are part of a "*de facto*" policy or practice. BIO 24. This is incorrect. The court in *Honey* provided two alternative grounds for its decision. First, the Court rejected the defendants' claim that *Parratt-Hudson* applied because "the deprivation resulted from actions that were in violation of established law," 195 F.3d at 534: "We hold that the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation

complained of, and the duty to afford Honey procedural due process." *Ibid.* Thus, the Court held, contrary to the view of the First Circuit, "even acts in violation of established law may be considered 'authorized.'" *Ibid.*

The opinion in *Honey* then proceeded to provide a second reason for denying the *Parratt-Hudson* defense in the case before it: "*Additionally*, this circuit does not apply *Parratt* where a deprivation occurs because officials are acting according to established procedures – even if those established procedures violate other state or federal laws." 195 F.3d at 534 (emphasis added). That additional reason for rejecting the defendants' *Parratt-Hudson* defense was, by its plain terms, an alternative holding. And in the Ninth Circuit, the law is clear that *both* alternative holdings are law of the circuit. See, *e.g.*, *Operating Engineers Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 778 F.2d 538 (CA9 1985). Accordingly, as the First Circuit itself recognized (see Pet. App. 14a n.6), the decision below conflicts with the Ninth Circuit's decision in *Honey*.

d. Second Circuit. Respondents argue that there is no split of authority between the First and Second Circuits because the Second Circuit's decision in *Dwyer* v. *Regan*, 777 F.2d 825 (1985), does no more than recognize "a special exception to the *Parratt-Hudson* doctrine and holds that conduct that otherwise could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a 'high-ranking official having final authority over the decision-making process.'" BIO 20 (quoting *Dwyer*, 777 F.2d at 832).

As an initial matter, respondents cannot and do not claim that this rule is consistent with the law of the First Circuit, which makes no exception for deprivations effected by "high-ranking officials." See Pet. App. 13a-15a; see also *Easter House* v. *Felder*, 910 F.2d 1387, 1402-03 (CA7 1990) (en banc) (rejecting *Dwyer*'s "high-ranking official" rule).

Respondents claim only that this circuit conflict is not implicated in this case because, they assert, the Sheriff would not be considered a "high-ranking official" under *Dwyer*. That assertion is unfounded.

Respondents argue that Sheriff McDonough does not qualify as a "high-ranking official" because his "hiring and firing decisions are constrained by state law such as" the statute that required him to provide petitioner a pre-termination hearing. BIO 21. But the same was true of the "high-ranking official" in *Dwyer*. See 777 F.2d at 831 (defendant's ability to terminate plaintiff constrained by N.Y. Civ. Serv. Law 75(1), which requires a pre-termination hearing); see also *Burtnieks* v. *City of New York*, 716 F.2d 982, 988 (CA2 1983) (*Parratt-Hudson* inapplicable to claim against high-ranking officials who were required by city ordinances to provide a pre-deprivation hearing).

Respondents further claim that the Sheriff was not a "high-ranking official" under *Dwyer* because his termination decisions were subject to review by the County Commission. BIO 21. But even if the possibility of such review made the Commission rather than the Sheriff the final decisionmaker, that would simply mean that the respondent Commissioners in this case are "high-ranking officials" under *Dwyer* even if the Sheriff is not. See *RR Village Assoc., Inc.* v. *Denver Sewer Corp.*, 826 F.2d 1197 (CA2 1987) (*Dwyer* applied to actions of a town council).[2]

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[2] Respondents point out that the Commissioners refused to exercise any control over the Sheriff's termination decision in this case, thinking that petitioner was not tenured. BIO 21 n.19. For the purposes of its decision, the First Circuit assumed that this conclusion was wrong. Pet. App. 12a-13a. Accordingly, as the case is presented to this Court, the Commissioners had the authority and responsibility to ensure that petitioner was provided a pre-termination hearing and, as a result, would be considered a "high-ranking officials" under *Dwyer*.

In any case, the Second Circuit has not limited *Dwyer* to officials with unreviewable authority. For example, in *Velez* v. *Levy*, 401 F.3d 75 (CA2 2005), the Second Circuit recently held *Parratt-Hudson* inapplicable in a case in which the Chancellor of the New York City school system removed a local school board member. Although that removal decision was subject to review by the City School Board, *id.* at 81, the Second Circuit nonetheless found that the Chancellor was a "high-ranking official" within the meaning of *Dwyer*. *Id.* at 92. It was enough, the court held, that the official "had the authority to remove [the plaintiff], and the duty as Chancellor to follow the governing New York statutes and regulations" that required a pre-termination hearing. *Ibid.*; see also *DiBlasio* v. *Novello*, 344 F.3d 292, 303 (CA2 2003). The same is true in this case – the Sheriff had both the authority to terminate petitioner and the responsibility to provide a pre-termination hearing. See *Clow* v. *Deily*, 953 F. Supp. 446, 453 (N.D.N.Y. 1997) (Commissioner of Police had "final authority over the decision to terminate Plaintiff from her position as a police officer" and therefore his acts were did not fall within the rule of *Parratt*).

The divergence between the rules of the First and Second Circuits is thus squarely presented in this case.

3. As shown above, the division cited in the petition is real and continuing. Indeed, even in respondents' view, the courts of appeals currently apply at least three different rules in evaluating claims under *Loudermill*: (a) some courts, including the First and Seventh Circuits, hold that *all* violations of state law are "random and unauthorized" (BIO 15 & n.15); (b) the Second Circuit has created an exception for the acts of "high-ranking officials" (BIO 20); and (c) the Ninth Circuit permits suits alleging deprivations that violate state law but are pursuant to a *de facto* policy (BIO 24). Even if that were a complete and accurate description of the state of the law (which it is not), certiorari would still be warranted to resolve this three-way conflict.

Moreover, in attempting to diminish the circuit split by relying on cases outside the employment termination context, respondents fail to acknowledge numerous recent cases declining to hold that an official's conduct was "random and unauthorized" simply because it was in violation of state law.[3] Thus, recharacterizing the question presented in broader terms simply illustrates the breadth of the conflict and confusion regarding the scope of the *Parratt-Hudson* doctrine. Petitioner acknowledges that this conflict and confusion may even extend to decisions in different settings within the same circuit. But that inter- and intra-circuit conflict is a reason to grant certiorari in this case, not a reason to assume that there is no real conflict at all.

Indeed, the judges of the courts of appeals have not shared respondents' view that the state of the law is clear and consistent. See, *e.g.*, *Locurto* v. *Safir*, 264 F.3d 154, 173 (CA2 2001) (stating that *Zinermon* "has generated considerable confusion among the courts of appeals," creating a "legal thicket"); *Charbonnet* v. *Lee*, 951 F.2d 638, 642 n.17 (CA5 1992) (remarking on the "legal and institutional instability" of *Zinermon*); *Caine* v. *Hardy*, 943 F.2d 1406, 1415 (CA5 1991) ("[T]he courts of appeals have not found *Zinermon* easy to interpret."); see also *O'Neill* v. *Baker*, 210 F.3d 41, 51 (CA1 2000) (Selya, J., concurring in judgment) (calling the *Parratt-Hudson* a "doctrinal swamp"); *Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring)

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[3] See, *e.g.*, *Woodard* v. *Andrus*, 419 F.3d 348 (CA5 2005) (County Clerk's policy of charging filing fees above state law limits not "random and unauthorized"); *Castellano* v. *Fragozo*, 352 F.3d 939, 956 (CA5 2003) (en banc) (*Parratt-Hudson* inapplicable to claim of denial of due process arising from unlawful use of manufactured evidence and perjured testimony); *Thomas* v. *Cohen*, 304 F.3d 563, 578-80 (CA6 2002) (doctrine inapplicable to unlawful eviction without prior hearing); *Brooks* v. *George County*, 84 F.3d 157, 165 (CA5 1996) (Sheriff's custom of failing to pay inmate wages due under state law not "random and unauthorized").

(describing the doctrine's development as "resembling the path of a drunken sailor").

4. Finally, as described in the petition (at 15-28), the First Circuit's decision effects a breathtaking, and erroneous, expansion of the *Parratt-Hudson* doctrine. The First Circuit rule prevents victims of even the most serious violations of the most basic due process rights from seeking a federal remedy whenever state law also prohibits the conduct and provides a post-deprivation remedy.

This result is contrary to the basic purposes of the Due Process Clause and 42 U.S.C. 1983, both of which were enacted in large part as a response to the "random and unauthorized" actions of state officials who arbitrarily deprived newly freed slaves of their lives and property in the face of state laws that promised equal treatment and fair procedures. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 801 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 174-76 (1961). The First Circuit's reading of *Parratt-Hudson* completely undermines those purposes, withdrawing a federal forum from victims of even the most egregious violations of the Constitution's most fundamental due process rights whenever the State happens to have incorporated those rights into state law as well. By the same token, the First Circuit permits a federal suit for less significant due process claims whenever a State has failed to incorporate federal due process standards into state law. Neither this Court, nor the framers of the Due Process Clause and Section 1983, could have intended to allocate access to federal remedies in such an arbitrary and haphazard manner.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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